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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970.

No. ~~1707~~ 70-169

UNITED TRANSPORTATION UNION,
an Unincorporated Labor Union, and
C. M. CAGLE,
Petitioners,

v.

ATLANTA AND WEST POINT RAIL ROAD COMPANY and
WESTERN RAILWAY OF ALABAMA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

HAAS, HOLLAND, FREEMAN, LEVISON & GIBERT
HUGH W. GIBERT
RICHARD N. HUBERT
R. C. FREEMAN, III
2709 First National Bank Tower
Atlanta, Georgia 30303
(404) 525-6141
Attorneys for the Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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To the United States Court of Appeals for the Fifth Circuit

Petitioners, the United Transportation Union and C. M. Cagle, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered *sub nomine* **Atlanta and West Point Rail Road Company and Western Railway of Alabama v. United Transportation Union, an unincorporated Labor Union, and C. M. Cagle,** on the 19th day of February, 1971.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, is set out in Appendix A hereto. The Order of the United States District Court for the Northern District of Georgia, reported at 307 F. Supp. 1205, is set out in Appendix B, hereto.

JURISDICTION

The decision of the Court of Appeals was entered on February 19, 1971.

The jurisdiction of the Court is invoked pursuant to Title 28 U.S.C. § 1254.

QUESTIONS PRESENTED

I

Whether the Court below erred in holding that a union should be enjoined from striking because of a failure to have meaningful Railway Labor Act negotiations where the failure to have such negotiations is attributable solely to the Carrier's actions to frustrate negotiations.

II

Whether the Court below erred in holding that the agreement between the Carrier and another union (Brotherhood of Locomotive Engineers), and its implementation, did not constitute a change in the terms and conditions of employment of the appellants' firemen, where the agreement, and its implementation, had an adverse effect upon the firemen's seniority and "historical expectation of promotion to the job of engineer."

III

Whether the Court below erred in holding that the Union should be enjoined from striking because of the failure to have Railway Labor Act negotiations where the Carrier instituted unilateral changes in working conditions (directly related to the subject matter of the Union's Section 6 Notice), while refusing to negotiate with the Union.

IV

Whether in issuing the preliminary injunction against the strike the District Court failed to give proper force and effect to Section 8 of the Norris-LaGuardia Act, and whether in affirming the Order of the District Court the Court of Appeals similarly erred?

V

Whether the District Court injunction and the Court of Appeals' affirmance constituted error where the Carrier's simultaneous (a) negotiation of an agreement with the Brotherhood of Locomotive Engineers, and (b) refusal to negotiate with Appellant, on a matter in which both unions had an interest, were for the purpose, and had the effect, of influencing the employees in their choice of representative in violation of Section 2 of the Railway Labor Act?

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Railway Labor Act and of the Norris-La Guardia Act are set out in Appendix C, hereto.

STATEMENT OF THE CASE

Petitioners seek review of a decision of the Court of Appeals for the Fifth Circuit which affirmed the issuance of a preliminary injunction prohibiting a strike in a railway labor "major" dispute.

Appellants are the United Transportation Union (UTU) and C. M. Cagle, a member of the Union who was sued as a representative of the membership. Appellees are the Atlanta and West Point Railroad Company and the Western Railway of Alabama. Hereafter we shall refer to the Appellees collectively as the "A & WP" or the "Carrier" since no distinctions need be made between the two companies.

The Union struck on November 15, 1969. On the same day the District Court issued an ex parte restraining order and the strike ended. A hearing was held on December 4th and 5th and on January 5, 1970 the Court entered the preliminary injunction. The Court of Appeals affirmed.

On November 15, 1965, that is, four years before the strike, the Brotherhood of Locomotive Firemen and Enginemen (B.L.F.&E.) served a Section 6 Notice upon the A & WP proposing a training program to qualify firemen for promotion to engineer. App. 139; for full text see App. 88-107. (The UTU is the successor of the B.L.F.&E.) The Railway Labor Act (45 USC, §151, et seq.) contemplates that when such notice is served then the party receiving the notice shall either accept the proposal or notify the proposing party that conferences on the proposal will begin at a specified time and place. The Act requires that these conferences begin within 30 days. See 45 USC, §156.

In the case at bar the Carrier responded to the Union's proposal by scheduling a conference. The conference was not scheduled, however, for the purpose of bargaining about the Union's proposal, but rather for the purpose of stating to the Union representative that the Carrier would not discuss the merits of the proposal. App. 139, 287-288, 349. Up to the time of the strike no negotiations on the merits of the Union's proposal had ever taken place.

No negotiations took place because the A & WP refused to negotiate, and thus violated the duty imposed upon both parties by the Railway Labor Act. We will return at a later point to the conclusion drawn by the District Court that "at one time or another" both parties refused to negotiate. The actions and positions of the Union were at all times forced responses to the several positions of the Carrier.

The A & WP, as grounds for refusing to negotiate, took, during the period November 15, 1965 to November 15, 1969, three legal positions. They were the following: (1) The Union's Section 6 Notice was "non-bargainable" because it was "premature." (2) The Union's Section 6 Notice had to be discussed concurrently with certain proposals by the Carrier, if and when it was discussed at all. (3) The Union's Section 6 Notice could not be discussed because the right of the firemen's union to bargain about a training program for promotion of its members to engineer was involved in litigation.

In order that these positions can be made understandable it is going to be necessary to broaden the discussion so as to place this dispute in its historical context and in context with the national dispute to which it is related. This we will now proceed to do. It is appropriate, however, to note here that each of the three positions taken by the Carrier has proved to be invalid.

The facts upon which most of the following discussion is based have been found in a number of reported decisions, among them **Brotherhood of Locomotive Engineers v. National Mediation Board, et al.**, 284 F. Supp. 344 (D.D.C., 1968), reversed in **Brotherhood of Locomotive Firemen and Enginemen v. National Mediation Board, et al.**, 410 F. 2d 1025 (C.A.D.C., 1959), cert. den. 396 U.S. 878, 24 L.Ed. 2d 136 (1969), and **Brotherhood of Railroad Trainmen v. Akron and B.B.R. Company**, 385 F. 2d 581

(C.A.D.C., 1968). These cases were called to the attention of the District Court and he relied upon the facts found in them. See, for example, footnote 1 of his Opinion, App. 135. See, also, the opinion of the Court of Appeals, p. 3.

The immediate history of the dispute goes back to the 1950's when the nation's railroads* sought to eliminate the job of firemen on diesel locomotives.

The position of the railroads was that firemen's jobs were superfluous, a contention opposed by the firemen's union, the B.L.F. & E.

The dispute resulted in a special Act of Congress, Public Law 88-108, 77 Stat. 132, which created Arbitration Board 282, with authority to resolve the dispute and bind the disputants to the resolution. Board 282 did resolve the dispute, the resolution being known as Award 282.

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* Reference is made to the "railroads" or the position of the "Railroads" or to the "Carriers" in recognition of the following facts. The A & WP is a member of the National Railway Labor Conference, an organization whose members comprise about 90% of the railroad companies in the United States. In the dispute discussed in this Brief the various members of the National Railway Labor Conference coordinated their actions, communicated with the Unions by means of form letters, and so on, with the National Railway Labor Conference calling the shots. The various positions taken by the A & WP with respect to the Union's Section 6 Notice were the positions suggested by the Railway Labor Conference and in almost all respects the same as the positions taken by various other railroads around the country. In fact, shortly after the Union had transmitted the Section 6 Notices, the A & WP, as did many railroads, conveyed its power of attorney to the National Railway Labor Conference to deal with the subject matter of the November, 1965 Notices. See App. 243.

In one respect, however, the A & WP acted differently from most of the other railroads. The A & WP signed an agreement with the Brotherhood of Locomotive Engineers (hereinafter B.L.E.) in the summer of 1969. Most of the other railroads did not take this action.

Award 282 allowed the railroads to eliminate the jobs of a great many (up to 90%) of the firemen in the country. As a result, some 18,000 firemen lost their jobs.

The award established work rules or procedures (pursuant to which the 18,000 jobs were eliminated) which were to have a two-year duration. It was contemplated by Congress that the parties would negotiate for new rules or procedures to replace or supplement Award 282 after it had expired. The two-year life of Award 282 was from January, 1964 to January, 1966 (except in the case of the B.L.F. & E. with respect to whom the Award expired March 30, 1966). The dates are of some significance and we shall return to them shortly.

Historically, two men had worked in locomotive cabs, namely the engineer and the fireman (also known as the "helper"). Traditionally, firemen had been promoted, after acquiring appropriate training and seniority, to become engineers. Almost all of the need for qualified engineers on the nation's railroads had been met by promotions from the ranks of firemen.

One of the consequences of the elimination of firemen's jobs pursuant to Award 282 was potentially to dry up the source of engineers. It became necessary to give systematic consideration to the question of procurement of engineers.

Two Unions claimed an interest in the establishment of training programs for prospective engineers. These were the B.L.F. & E. (now the UTU) and the B.L.E. The claim of the BLF & E was predicated on the proposition that it had a right to negotiate about training for posts into which its members had traditionally graduated. Also, seniority acquired as a fireman had always qualified a man for a promotion to engineer and had given him a claim to the job. Contracts between the BLF & E and the BLE and the Railroads had for many years limited the

right of the railroads with regard to the hiring of engineers other than from the firemen's ranks. (The history of that situation goes at least as far back as 1913 when the BLF & E and the BLE signed what is known in the railroad industry as the Chicago Joint Agreement. Although this agreement was abrogated by the BLE in 1927, the seniority and promotion rules contained therein continued to be negotiated into contracts with the carriers.)

The BLE on the other hand, claimed an interest in any training program for apprentices who would ultimately join the ranks of the engineers and the BLE.

On November 15, 1965, the BLF & E served notices upon a large number of railroads to the effect that the BLF & E desired to negotiate about certain proposed changes in the conditions of employment of its members (Section 6 Notices, pursuant to Section 6 of the Railway Labor Act, codified at 45 USCA, § 151, 156). These notices, known respectively as Notice No. 1, Notice No. 2 and Notice No. 3, were served on the A & WP. Notice No. 3 called for negotiations for the establishment of a training program for firemen to equip them for future promotion and was involved in the strike which was restrained, ex parte, by the District Court on November 15, 1969, and preliminarily enjoined on January 5, 1970. App. 133-147. Therefore, the treatment by the parties of Notice No. 3 is one of the matters which is at the heart of the dispute and at the heart of this litigation. In our view, it is only the treatment of Notice No. 3 which is of crucial importance to this case, but the second position (supra) by the railroads (the demand for concurrent handling) makes it necessary to continue, for a time, discussion of Notices Numbered 1 and 2.

Each of the three November 15, 1965 Notices proposed changes in the work rules to become effective March 31, 1966, that is, the day after the expiration of Award 282.

Therefore, they contemplated negotiation during the two year period when work rules were established by Award 282. The railroads took the position that the Notices were, for that reason, non-bargainable. That is, they took the position that Award 282 relieved them of any obligation to bargain during its life, even with respect to changes in working conditions proposed to be effective **after** the expiration of Award 282. This was the A & WP's first contention referred to above, that the notices were "premature." App. 288-290.

Shortly after Notice No. 9 was served by the BLF & E, the BLE had notified the Railroads that they should not bargain with the BLF & E with respect to Notice No. 3. When the National Mediation Board scheduled mediation conferences with the BLF & E and L & N and BLF & E and the Southern Pacific to discuss Notice No. 3, the BLE filed suit to enjoin the conferences. This was the lawsuit reported as **Brotherhood of Locomotive Firemen and Enginemen v. National Mediation Board**, et al., 410 F. 2d 1025, supra, certiorari denied, 396 U.S. 878, October 20, 1969.

The A & WP was not subject to any injunction not to bargain with the BLF & E because of that lawsuit. Nevertheless, the A & WP refused to negotiate while the suit was pending. This was the A & WP's third position referred to above. The District Court's statement in his opinion that "While this litigation was pending it appears that all parties held off awaiting the outcome" is flatly contradicted by the evidence. (The Court of Appeals regarded this conclusion as "plausible." See its Opinion, p. 5.) The uncontradicted testimony of Mr. Carr of the Union was that he made numerous requests of the Personnel Manager of the Carrier to negotiate about Notice No. 3 and the reply he always received was that the Carrier would not negotiate because of the BLE-L & N litigation. App. 350-352.

The BLE-L & N litigation resulted in an opinion in March, 1969 holding that Notice No. 3 was bargainable and that the Carrier was obligated to bargain with the firemen's union about it. That is, the position of the Carriers and the BLE was rejected. **Brotherhood of Locomotive Firemen & Enginemen v. National Mediation Board**, 410 F. 2d 1025, supra. Nevertheless, no bargaining between the A & WP and the UTU took place. The carriers and the BLE filed, in June, 1969, petitions for certiorari to this Court, which petitions were denied in October, 1969.

While the petitions for certiorari were pending, the Railway Labor Conference's position was that it would still be "inappropriate" to bargain about proposals for a training program. See Circular No. 535 of June 10, 1969. App. 83. The A & WP adopted that position in a letter to the General Chairman of the BLE dated June 16, 1969, App. 84, but evidently abandoned it vis-a-vis the BLE because, while the petitions were pending, an agreement was signed between the BLE and the A & WP. App. 134, 302, 308.

In November, 1969 the A & WP began to implement its training program agreement with the BLE. The UTU which had tried for four years to bargain over its own training program proposal, and which had had all its efforts frustrated for four years, went out on strike. The District Court, in spite of the Norris-LaGuardia Act, enjoined the strike after less than one day, and a little over a year later the Court of Appeals affirmed.

WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

As will be more fully shown, hereinafter, the Order of the District Court and the decision of the Court of Appeals ignored, or failed to apply properly, Section 8 of the Norris-LaGuardia Act, 47 Stat. 70, 20 U.S.C., § 101,

108, and the status quo provisions of the Railway Labor Act, 45 U.S.C., § 151, et seq., and were in conflict with applicable decisions of this Court, and of other Courts of Appeals. In particular, the decision below conflicted with the decision of this Court in **Brotherhood of Railroad Trainmen v. Toledo, Peoria & W.R. Co.**, 321 U.S. 50, 88 L. Ed. 534, 64 S.Ct. 413 (1944), and **The Detroit and Toledo Shore Line R. Co. v. United Transportation Union**, 396 U.S. 142, 24 L.Ed. 2d 325, 90 S.Ct. 294 (1960). In addition, the decision below conflicted with decision of Courts of Appeals of other Circuits, which will be discussed, infra.

(a) The Carrier Did Not Make Every Reasonable Effort to Settle the Dispute

As of the date of the *ex parte* restraining order, the union had been trying for exactly four years to engage the Carrier in negotiations with respect to Notice No. 3 and for exactly four years the Carrier had prevented negotiations from taking place.

This Court has often recognized that it is the duty of a federal court, called upon to enjoin a strike in a labor dispute in the railroad industry, to **reconcile** the policies underlying the Railway Labor Act, 45 USC, § 151, et seq., on the one hand, and the Norris-La Guardia Act, 47 Stat. 70, 29 USC, § 101, et seq., on the other. See, for example, **Brotherhood of Railroad Trainmen v. Chicago and I.R. Co.**, 353 U.S. 30, 1 L.ed. 2d 622, 77 S.Ct. 635 (1957). Neither of the Courts below has reconciled the policies of the two Acts but, instead, both have relegated Norris-La Guardia to a completely subordinate status. If the decision stands unreversed, section 8 of Norris-La Guardia will have been, in effect, repealed.

Although Section 4 of the Norris-La Guardia Act is absolute in its terms,

> "No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute . . ."

it has not operated to abolish completely the labor injunction. Evidently that is what the District Court had in mind when he said, "Nothing in the Norris-La Guardia Act bars such relief."

However, no case (with the exception of this one, so far) had held that the Norris-La Guardia Act has **no** place in a railway labor dispute. The duty of the Court is to **reconcile** the policies of the two Acts and it may not simply ignore Norris-La Guardia in the name of preventing an interruption of railroad service, no matter how important that goal may be.

Section 8 of the Norris-La Guardia Act provides as follows:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, **or who has failed to make every reasonable effort to settle such dispute** either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." (Emphasis supplied.)

Brotherhood of R.T. v. Toledo, Peoria & W.R. Co., 321 U.S. 50, 88 L.Ed. 534, 64 S.Ct. 413 (1944), is the case which has given the definitive interpretation of that provision. In that case there was a strike accompanied by violence. (The events all took place between the bombing of Pearl Harbor and the end of World War II, a time when interruption of transportation service was at least as important as it is now.) The employer had declined to participate in **voluntary** arbitration. **It had no duty to**

do so under the Railway Labor Act. Nevertheless, failure to do so was a failure to "make every reasonable effort to settle such dispute" as is required by Section 8 of Norris-La Guardia. Therefore, the issuance of an injunction was improper and was reversed.

The effect of Section 8 and its relationship to the Railway Labor Act was made crystal clear in the following language of the Court:

> "Broadly, the section imposes two conditions. If a complainant has failed (1) to comply with any obligations imposed by law or (2) to make every reasonable effort to settle the dispute, he is forbidden relief. The latter condition is broader than the former. One must not only discharge his legal obligations. He must also go beyond them and make all reasonable effort, at least by the methods specified if they are available, though none may involve complying with any legal duty." 321 U.S. at 57.

And further on:

> "Respondent's final contention, in this phase of the case, is the most insistent. It is that if 'voluntary arbitration', as the term is used in § 8, encompasses arbitration under the Railway Labor Act, by that fact the arbitration ceases to be 'voluntary' and the latter Act's requirement that it be so is violated. In short, it is said the effect is to force respondent to submit to compulsory arbitration.
>
> . . .
>
> "And if the effect of bringing that form of arbitration within the mandate of § 8 of the Norris-La Guardia Act were to create such a duty, so enforceable, respondent's contention would be more in point. But it does not do that. . . . Respondent's failure or refusal to arbitrate has not violated any obligation imposed upon it, whether by the Railway Labor Act

> or by the Norris-La Guardia Act. No one has recourse against it by any legal means on account of this failure. Respondent is free to arbitrate or not, as it chooses. **But if it refuses, it loses the legal right to have an injunction issued by a Federal court or, to put the matter more accurately, it fails to perfect the right to such relief.**'' 321 U.S. at 62, 63. (Emphasis supplied.)

It seems to us that this makes the point very clearly. Section 8 of the Norris-La Guardia Act is an inhibition on the equitable power of the federal court. As such, it stands on a different footing from the Railway Labor Act. Not one word was said by the Court about whether the Union had violated obligations under the Railway Labor Act. In fact, the persistence of incidents of violence which the local authorities could not or would not control certainly made the case an appropriate one for federal intervention. But the Norris-La Guardia Act precluded the injunction because the employer, **though it had done everything required of it by the Railway Labor Act,** had not ''perfected'' its right to equitable relief by making ''every reasonable effort to settle'' the dispute.

In the case at bar there is no pretense that the A & WP had made every reasonable effort to settle the dispute with the UTU. The hearing on December 5th* began with a controversy over who had the duty to go forward with evidence. See App. 222-225. It is clear that the District Court was of the opinion that the Union was required to justify its strike, not that the Carrier had to justify its claim to equitable relief, let alone the obligation to show that it had ''perfected'' such claim by making every reasonable effort to settle the dispute. The controversy over the order of proof ended when counsel for the Carrier stated:

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* The hearing on December 4th was very brief and did not include presentation of evidence.

"Mr. Major: I'm perfectly willing to go ahead and prove those **base-touching** allegations, Your Honor." App. 225 (Emphasis supplied.)

The District Court did not find that the Carrier had perfected its right to equitable relief. To the contrary, it held that the Carrier was entitled to injunctive relief even if the fact that negotiations had not taken place as is contemplated by the Railway Labor Act was the sole fault and responsibility of the Carrier! These words are the crux of the decision on this point:

> "Holding as we do that the carriers' mere refusal to bargain, standing alone, would not provide a lawful basis for a strike, it follows that we need not decide which party is the culprit, or indeed whether both parties have failed to fufill their statutory obligation to confer." District Court Opinion, p. 13; App. 146.

How that holding can be squared with **Toledo, Peoria,** supra, is beyond us. It shows a complete disregard of Norris-La Guardia, where the question is **not** whether the Union can show a lawful basis for a strike, but whether the employer can show that it has perfected a claim to equitable relief.

In affirming, the Court of Appeals also stood the Norris-La Guardia Act on its head. On page 13 of its Opinion the Court below said (apropos of **Toledo, Peoria**):

> "Crucial to the Court's rationale is the fact that at the time the railroad sought to enjoin the strike, it was also refusing to arbitrate. Thus the union had exhausted every available avenue to agreement **and was free to resort to self-help, whatever the consequences.**" (Emphasis supplied.)

But the **Toledo, Peoria** case is clearly bottomed upon Section 8 of Norris-La Guardia which was designed to protect the right to strike and is solely for the purpose

of limiting the authority of courts to issue injunctions against strikers at the behest of employers. The "clean hands" provision (§ 8) is aimed at employers, not unions. The employer must have clean hands. So far as Norris-La Guardia is concerned the Union does not have to do anything in order to become "free to resort to self-help." The claim is always that the union is not free to resort to self-help because of illegality of the strike and Norris-La Guardia says, in effect, "Even if the union's strike is illegal, you, Mr. Employer, may not get an injunction from a federal court to end the strike unless you, Mr. Employer, come into court with clean hands."

To end the analysis at the point of deciding that the union is not "free to resort to self-help," as both of the courts below did, is to end it precisely at the point where section 8 of Norris-La Guardia and this Court in **Toledo, Peoria** say that analysis must begin.

To read **Toledo, Peoria** as turning upon what the union had done to make itself free to strike is to misread it completely.

None of the cases cited by the Court below actually support the conclusion that it was proper to enjoin the strike. Three cases were cited by the District Court, followed by the statement that it followed that negotiations had to begin and the strike had to be enjoined. The cases relied on were **National Airlines, Inc. v. International Ass'n. of M.&A.W.**, 416 F. 2d 998 (C.A. 5th, 1969), **American Airlines, Inc. v. Airline Pilots Ass'n.**, 169 F. Supp. 777 (S.D. N.Y., 1958), and a dissenting opinion in **Rutland Ry. v. Brotherhood of Locomotive Engineers**, 307 F. 2d 978 (1963). Each of these cases was contrary to the position taken by the Court below. Each of these cases was consistent with the position urged here, namely that Norris-La Guardia forbids an injunction in a railway labor case, unless **both** (1) the strike is in violation of the Union's

duties under the Act **and** (2) The carrier has satisfied the mandate of Section 8 of Norris-La Guardia. The second requirement encompasses **both** (1) complying with all the requirements of the Railway Labor Act **and** (2) going the extra mile involved in making every reasonable effort to settle the dispute.

That is quite clearly the holding of the **Rutland Railway** case. At 307 F. 2d 37 the Court said the Norris-La Guardia deprives federal district courts of jurisdiction to enjoin strikes except in limited circumstances,

> "and precludes injunctive relief even when these stringent requirements are met if the complainant has failed to fulfill, on its part, its legal obligations or has failed, on its part, to make reasonable efforts to settle the labor dispute by negotiation, mediation or voluntary arbitration."

The explicit holding of the **Rutland Railways** case appears at 307 F. 2d 41:

> "In the present case the district court made no finding whether the management of the railroad made the good faith efforts which we have held to be a prerequisite to the obtaining by it of injunctive relief . . .
>
> . . .
>
> Therefore, we must remand the case for the district court to determine whether the railroad made reasonable efforts to settle this dispute in conference."

We fail to see why the court below was justified in relying upon a statement drawn from a dissenting opinion in view of that clear holding.

The **American Airlines** case provides no more support for the conclusion of the court below. In that case the court held, at 169 F. Supp 798, that the employer had

failed to show that the union had violated the Railway Labor Act, and therefore **denied** the preliminary injunction. It then went on to say:

> "Since this is so it is unnecessary to pass on the Union's contention that the Company is barred from injunctive relief under Section 8 of the Norris-La Guardia Act because of its refusal to submit any except limited issues to arbitration under Section 5 of the Railway Labor Act. Cf. **Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27 v. Toledo, P. & W.R. Co.**, 321 U.S. 50, 64 S. Ct. 413, 88 L.ed. 524."

The **National Airlines** case involved a "wildcat" strike, which was actually opposed by the union. At 416 F.2d 998 the Court pointed out:

> "The Union here has consistently maintained that the strike was unlawful, and, with the exception of its objection to the language pertaining to discharge contained in the second order issued by the court, concedes the propriety of injunctive relief to end the strike."[4]

At this point, in footnote 4 the Court indicates that the concession was misplaced and gratuitously points out that in spite of the illegality of the strike it might have been immune from an injunction by virtue of Section 8 of Norris-La Guardia. Thus, **National Airlines** is not contrary to the position taken here and does not support the conclusion of the Court below that a carrier that prevents a union from engaging in negotiations prescribed by the Act can use the result it has unlawfully achieved as a **basis** for obtaining equitable relief.

That was a truly remarkable conclusion, and it finds no support in the cases.

Thus, the granting of the injunction would be wrong even if, as the District Court seemed to suggest, in the above excerpt and elsewhere in his opinion, the Union was a "culprit" also and might have refused to bargain over its own Section 6 Notice. That factual suggestion, in any event, is not supported by the record. The whole record shows clearly that the Carrier frustrated the efforts to bargain by taking three untenable positions.

First, it was said that no bargaining could take place with respect to Notice No. 3 because it was "premature". App. 288-290. See DX 7 and 8, App. 108-112, and the uncontradicted testimony of Mr. Carr, beginning at App. 351. Even in the summer of 1969 the Railway Labor Conference was giving advice that it was "inappropriate" to bargain because of the pendency of the petitions for certiorari, App. 83, and the A & WP was parrotting that line. App. 84-85. The short answer to the contention is that it was rejected by the Court of Appeals for the District of Columbia in the L & N case. See 410 F. 2d 1025, 1032.

The effect of that holding is that the Carrier has been in violation of the Railway Labor Act since late 1965. The District Court's suggestion that perhaps the Union, which fought that case to a successful conclusion for the purpose of vindicating the right to bargain over Notice No. 3, was the culprit that refused to bargain is absurd on its face.

The Carrier took the position that no bargaining could take place with respect to any of the November 15, 1965 notices prior to March 30, 1968. See the testimony of Mr. King, Personnel Manager for the Carrier, at App. 290:

> "Mr. Gibert: With regard to Notice Number 1, 2, and 3, you took the position that none of those was

bargainable during the period prior to March 30, 1966, is that correct?

The Witness: That's correct."

The District Court relied, for its suggestion that the Union has refused to bargain, entirely upon a letter of February 22, 1966, from Mr. Carr of the Union saying that talks had ended. See p. 7 of the District Court Opinion, App. 141. But this misconceives the situation. The Railway Labor Act prescribes certain procedures. The Union desired to exhaust those procedures because the Carrier had made it clear that it would not negotiate. Mr. Carr's letter, therefore, written at a time when the Carrier would not negotiate because of its "prematurity" claim, was an effort to move the matter off dead center. It failed because of the resourcefulness of the Carrier, as we have seen.

Mr. Carr's letter also was a rejection of "concurrent handling." This relates to the Carrier's second position, discussed infra. Mr. Carr's rejection of concurrent handling was proper.

Moreover, Mr. Carr testified without contradiction that he tried numerous times after February 22, 1966 to negotiate with the Carrier about Notice No. 3. The answer was always that no negotiations could take place because of the pendency of the litigation. App. 351-352.

The District Court seemed to rely upon the informality of Mr. Carr's requests to negotiate and to suggest that the Union was required to make further "formal" offers to negotiate. See p. 8 of the District Court Opinion, particularly footnote 10:

> "It is true, however, that at the hearing the head of the union did testify that thereafter at one or more chance meetings he did orally mention further negotiations which were refused." App. 141.

Indeed he did so testify, and without contradiction. And what was the point of making a "formal" offer? There was already an elaborate proposal (Notice No. 3) on the table and the Carrier's position that, for several different reasons, it would not negotiate about it had been made very clear.

Besides, the Carrier is not always so scornful of informal requests to negotiate. See the following colloquy between counsel for the Union and Mr. King of the A & WP:

"By Mr. Gibert:

Q. They start with Section 6 notice, right? That is, these major dispute questions.

A. Not necessarily. We have negotiated agreements without necessity of a Section 6 Notice.

Q. Oh. Then, how? Telephone conversations?

A. Telephone conversations or personal telephone calls or chance encounter in many cases." App. 296.

The Court of Appeals added a ground for finding that the Carrier was ready to negotiate but the union was not. On page 15 of the Opinion, it is stated that the Carrier, even if it frustrated negotiations for four years, was ready to negotiate on the day of the strike. With respect, we say that the Court of Appeals is mistaken.

The District Court did not find that the Carrier was ready to bargain on November 15, 1969. The facts upon which the assertion of the Court of Appeals is predicated were that the National Railway Labor Conference, on November 7, 1969, sent a letter to the Union President proposing negotiations in Washington, D. C. (Appendix, p. 49).

In this letter the Railway Labor Conference was not actually attempting to commence negotiations. It was, for one thing, falling back to its second position, "concurrent handling." We will discuss the merits of the second position more fully, infra, but it is important to remember

that the demand for concurrent handling was a device briefly used in early 1966 to avoid negotiations, a device that was put on the shelf after the commencement of the litigation in Washington. The pendency of the litigation did service as a way of avoiding negotiations until October 20, 1969, so on November 7 position number 2 was dusted off and pressed back into service.

In addition, the letter of November 7 inserted a new issue, namely, national versus local handling. In effect, the proposal to negotiate in Washington, with the Railway Labor Conference and the president of the union as negotiators, was a demand for national handling and was in no sense an expression of willingness by the Carrier involved in the case at bar to negotiate with the union. Parenthetically, national handling is desired by the carriers so that negotiations will take place in a crisis atmosphere, that is, so that any strike will create a national emergency.

The issue of national versus local handling was not actually presented to either of the Courts below. It was not briefed or argued. By saying that the carrier was ready to negotiate because of the letter of November 7, 1969, the Court of Appeals has, perhaps unwittingly, decided the complex issue of national versus local handling without the benefit of argument, briefs or evidence.

In **Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad Company**, 383 F. 2d 225 (C.A.D.C., 1967), cert. den. 389 U.S. 1047, the issue of national versus local handling was discussed. The District Court had enjoined a strike on the ground that the union had improperly refused the carrier's request for national handling. The Court of Appeals reversed and this Court denied certiorari. The Court of Appeals held that national handling was lawful if both parties agreed, but not necessarily required if one party objected and said:

> "We would require a strong showing of continuous collective bargaining practice on a national scale before we find an obligation imposed by Congress to bargain on a basis deemed 'wholly unrealistic' by objective boards officially deputized to study the underlying problems and formulate appropriate dispositions." 383 F.2d at 229.

In fact the case at bar was not appropriate for national handling since the A & WP was not in the same posture as the other carriers. The A & WP had signed an agreement with the BLE and most of the nation's carriers had not.

However, regardless of the merits of this dispute, the District Court had not decided it and there was certainly not made any

> "strong showing of continuous collective bargaining practice on a national scale."

For that reason also, the Court of Appeals should not have held that the A & WP finally repented and become ready to negotiate on November 7, 1969. The District Court did not find that, and the evidence would not have warranted such a finding.

Even at the preliminary injunction hearing, where at least the pretense of being willing to negotiate was obviously called for, the representative of the carrier was curiously ambivalent about it, to say the least:

> "Q. Are you prepared to negotiate on Monday morning, again, sir? At 4 Hunter Street? A. Depends on the terms.
>
> Q. Well, are you—— A. Are you saying, if you're asking for dissolution or, doing away with this restraining order and say we'll negotiate and spend ten minutes and walk out Monday and put up picket

signs, sir, is that, those are some of the terms we need to know.

Q. Good faith negotiations between the UTU, represented by Mr. Carr, and the A & WP represented by you, about Notice Number 3 on Monday morning at 4 Hunter Street? A. What is your definition, sir, of good faith negotiations?

Q. Can you answer the question? A. It would depend on what you mean by good faith negotiations. If it's a touch-base proposition with another strike before day in the morning, my answer is no.

The National Railway Labor Conference has said for us that we will mediate the dispute under the provisions of the Railway Labor Act, the machinery set up for handling such disputes.

Q. For that matter, you could invoke the National Mediation Board for the A & WP, could you not? A. That has been done for us by the National Railway Labor Conference.

Q. You could have done that at any time? A. That's correct. And so could the former BLF & E. They didn't.

Q. And you didn't? A. That's right. And neither did the organization, sir.

Q. All right. And you can't tell me whether in response to my question, since you don't know what I mean by good faith negotiation, you can't answer the question of whether you're willing for the A & WP and the Union to commence good faith negotiations on Monday morning, on Notice Number 3? A. Mr. Gibert, in twenty-nine years of railroading, I've seen good faith negotiations mean many things to many people. App. pp. 342, 343.

The only other possible basis for the Court's suggestion that the Union refused to negotiate relates to the second position of the Carrier. It will be remembered that the

second position was that the three November 15, 1965 Notices were a "package" proposal and had to be discussed concurrently with the Carrier's so-called counterproposal. See p. 7 of the District Court Opinion, App. 139-140.

Regardless of the merits of that dispute, the Carrier's second position was only relied on until the summer of 1966. At that time it was replaced by the third position, that the litigation precluded negotiations.

The Carrier's second position was specious in any event. Notice No. 1 related to the types of engine service on which the employment of firemen would be required.

Notice No. 2 provided for compensation to firemen who had been relocated, severed or otherwise disadvantaged by the operation of Award 282.

Notice No. 3 called for establishment of a training program for apprentices. See **Brotherhood of R.R. Trainmen v. Akron & B.R. Co.**, 385 F. 2d 581 at 600 (C.A.D.C., 1967), cert. den. 390 U.S. 923, 19 L.Ed. 2d 983, 88 S.Ct. 849 (1968). See also Defendants' Exhibits 7 and 8, App. 108, 112.

Thus the three notices related to different things. The railroad's counterproposal clearly related to Notice No. 1; it said nothing about a training program and therefore was in no sense a counterproposal to Notice No. 3.

The subsequent treatment of the notices also shows the speciousness of the Carrier's second position. In **Brotherhood of Railroad Trainmen v. Akron & B.B.R. Co.**, 385 F.2d 581 (C.A.D.C., 1967), the Court held that Notice No. 1 was bargainable, Notice No. 2 was not, and that it need not rule on Notice No. 3. Notice No. 3 was held bargainable in the case reported at 410 F.2d 1025. Thus the notices were treated separately and as presenting separate issues.

Moreover, Notice No. 1 **and the Carrier's counter-proposal** were jointly mediated, up to the level of the Secre-

tary of Labor. See App. 327. Thus, it is clear that the Carrier's insistence on negotiating Notice No. 3 concurrently with the unrelated counterproposal and the Union's refusal to do so cannot be used as justification for the injunction. The whole history of the dispute, including the Carrier's shelving of its second delaying tactic in favor of its third shows that the call for "concurrent handling" was no more than that, a delaying tactic.

Thus, and to conclude this portion of the argument the District Court's opinion that the Union may have frustrated the negotiations or may have been equally at fault with the Carrier is seen to be totally without support in the record. But, even if it were factually supportable, it would still be improper to issue the injunction because of the Carrier's failure to meet its obligations under Section 8 of the Norris-La Guardia Act.

(b) The Carrier Made a Unilateral Change in Working Conditions

It is the position of the UTU that the agreement between the A & WP and the BLE and its implementation make a change in the working conditions of the firemen. Since no Section 6 Notice was served by the Carrier upon the firemen's union, the UTU, this constitutes a separate and independent justification for the strike and a separate reason that the injunction was unlawful.

Section 2, Seventh of the Railway Labor Act provides:

> "No Carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 6 provides, in pertinent part:

> "Carriers and representatives of employees shall give at least thirty days' written notice of an in-

> tended change in agreements affecting rates of pay, rules, or working conditions . . . In every case where such notice of intended change has been given . . . rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . ." 45 USC, §152.

There is no claim in the case at bar that the A & WP complied with those provisions, vis a vis the UTU, prior to making and implementing the training agreement with the BLE. Much of the Opinion of the court below was devoted to defending the position that it did not have to do so because that agreement and its implementation did not change the working conditions of the firemen.

This conclusion was plainly erroneous.

Two cases make it clear that, in spite of the expression, "embodied in agreements," used in Section 2, Seventh, the concept "working conditions" is given a very broad meaning to include any custom, established practice, expectation based on custom, or the like. These cases include **United Indus. Wkrs. of Seafarers, etc. v. Board of Trustees**, 351 F. 2d 183 (C.A. 5th, 1965), where the leasing of certain facilities by the employer resulted in the "permanent layoff" of some employees. The Carrier contended that since it did not make or propose to make a change in the **agreement** the dispute was a "minor" dispute.* The Court rejected this argument, relying upon **Order of R. R. Telegraphers v. Chicago & N.W.R.R. Co.**, 362 U.S. 330, 4 L.Ed. 2d 774, 80 S.Ct. 761 (1960), which had held that a stipulation about contracting out of work ordinarily performed by members of the union was a "condition of employment."

Even more conclusive is **The Detroit and Toledo Shore Line R. Co. v. United Transportation Union**, 396 U.S. 142,

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* Cf. **Elgin, Joliet & E. Ry. v. Burley**, 325 U.S. 711, 89 L.Ed. 1886, 65 S.Ct. 1282 (1945).

24 L.Ed. 2d 325, 90 S.Ct. 294 (1960). There the contract was completely silent on the question of "outlying work assignments" (the right of the railroad to make work assignments away from its main yard). This Court phrased the question and its answer as follows:

> "Respondent, a railroad brotherhood, contends that what must be preserved as the status quo are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing collective agreement. For the reasons stated below, we think that only the union's position is consistent with the language and purposes of the Railway Labor Act." 24 L.Ed. 2d at 329.

It is clear that the historical expectations of the firemen that they will be promoted to engineer, and the seniority rules related to these expectations are a term or condition of the employment of the firemen. As such, these expectations are part of the status quo that the Carrier had no right to change without complying with Section 6 of the Act.

The **very question** now being discussed was decided by the Court of Appeals for the District of Columbia in the case reported at 410 F.2d 1025. Evidently the Court below overlooked the following language from that case:

> "Here, even assuming that the Firemen will never represent any of the apprentice engineers, present firemen have a 'job security' interest in the length and size of the apprentice program. Their union has long bargained with the carrier over the process of turning firemen into engineers.[20] In the past they have even bargained to restrict carriers' practice of bringing in outside engineers to fill vacant jobs.[21] Thus their historical expectation of promotion to the job of engineer is a 'term or condition' of their em-

ployment which their union may legitimately bargain to protect." 410 F.2d at 1032.

The Court's footnote 21 also deserves quoting:

> "While the railroads were under federal control during World War I, firemen complained that their promotional chances were being impaired by the carriers' practice of hiring outside engineers over the heads of their own firemen with many years' seniority. As a result, the industry adopted the 'Chicago Joint Agreement', which regulated this practice. When the railroads returned to private control, the provisions of the Chicago Joint Agreement were retained through collective bargaining."

The agreement between the A & WP and the BLE, providing, as it does for bringing in outside apprentices to be trained to become engineers, obviously affects the firemen's "historical expectation of promotion" to engineer. At the hearing it was shown that the A & WP had brought in four (4) outside apprentices, App. 179, and it was also shown that a number of appellant's firemen qualified to work as engineers were not so working. App. 348.

Moreover, the A & WP-BLE agreement shows on its face that those two parties negotiated provisions explicitly applicable to firemen. The following provisions are illustrative:

> Article I
>
> 1. (a) "Firemen in the carrier service will be given an opportunity to enroll in the training program in their seniority order by registered mail, return receipt requested. If a fireman does not desire to enter the program, his refusal will be classed as a failure for qualifying purposes, and a seniority number will not be reserved for him on the engineer's roster." App. 395-396.

The A & WP-BLE agreement contains provisions about rates of pay for apprentices, not necessarily the same as those for firemen. Thus, a fireman can be presented a "Hobson's choice", either to forfeit his seniority rights or work at rates of pay negotiated for him not by his own union but by another. Under the Railway Labor Act only the UTU has the right to negotiate for the firemen.

Another example:

Article III

> "Upon successful completion of the training program, an apprentice shall be given a certificate stating that he has become a journeyman locomotive engineer and shall be hired and allowed to work one trip as an extra engineer existing agreement rules to the contrary notwithstanding, thus establishing his engineer seniority as of that date of first service." App. 399.

This "extra engineer" service is what the firemen do. That is, the agreement provides for hiring the apprentices as firemen, under another name. Moreover, the seniority rule set forth is adverse to the interests of the firemen.

Even the National Railway Labor Conference agreed that the BLE proposal adversely affected the firemen. In Circular No. 535-2 of November 17, 1969, DX 18, App. 131, member roads were referred to the BLE's proposal dealing with the "Source of supply and qualification and training of engineers (apprentice engineers)." Member roads were given the opinion that a proposal on such a subject was of "questionable legality," in that, if adopted, it would adversely affect employees holding seniority in a craft represented by another organization . . ." App. 132.

The Court of Appeals for the District of Columbia took note of the fact that the L & N, like the A & WP, had employed apprentices, and said:

> "But that program had been worked out solely between the Carrier and the Engineers. The Firemen had not yet been able to bargain about the nature of the program. The Board could not fairly make its determination on the basis of a program respecting which only one of the two competing unions had had its say. To have done so would have in effect accepted a *fait accompli* achieved only because the carrier had improperly refused to bargain with the Firemen." 410 F.2d at 1034.

It is clear from all of the above that the conclusion of the District Court that the BLE-A & WP program did not affect the "historical expectations" of the firemen to be promoted to engineer (hence, a term or condition of their employment) was clearly erroneous. What the Court did was accept the precise *fait accompli* that the Court of Appeals for the District of Columbia had said could not be accepted since the carrier is even now bringing in apprentices and allowing them to work as firemen (under a different name) and acquire seniority rights vis a vis the firemen.

Since the Carrier improperly altered the status quo, the Court below should have taken the steps necessary to restore it. See **The Detroit & Toledo Shore Line R. Co.**, supra. Since the Carrier had altered the status quo, it was error to enjoin the strike. **The Detroit and Toledo Shore Line**, ibid., where the status quo was ordered restored and the strike was **not** enjoined.

(c) The Real Purpose of the Carrier Is to Destroy the U.T.U., a Purpose Forbidden by the Act

Section 2, Third of the Railway Labor Act provides as follows:

> "Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the

designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives."

Section 2, Fourth provides as follows:

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . ." 45 USC, § 152.

The actions of the A & WP are consistent only with a desire and purpose to destroy the firemen's union. For four years they fought against negotiating with the UTU, and continued to avoid negotiations even after losing the case at 410 F. 2d 1025. Nevertheless, under cover, as it were, of the petitions for certiorari, it rushed out and made, in about a month's time, an agreement with the BLE with numerous provisions affecting the firemen. What could be more calculated to influence the employees to leave the UTU and select the BLE as their representative?

Moreover, the matter cannot be considered in isolation. The history of the dispute, set out in the cited cases, shows that what it is all about is the desire of the railroads to

eliminate the craft of fireman. Award 282 gave the carriers much of what they wanted but they will apparently be satisfied only with the whole loaf. To that end they have employed the tactics described in this brief.

CONCLUSION

Both of the Courts below appear to regard a strike as an alternative to negotiations. The history of this dispute shows that that is not the case. The fact is that there will never be negotiations with respect to Notice No. 3 until the union is free to resort to self-help. As soon as a non-enjoinable strike takes place, the parties will negotiate an agreement, not before. When that happens, some measure of peace may come to the industry.

We respectfully urge that the writ be granted and that the case be remanded with instructions to the Court below to take steps necessary to restore the status quo by ordering termination of the A & WP-BLE training program and any rights that may have accrued or may be claimed under it.

Respectfully submitted

HAAS, HOLLAND, FREEMAN,
LEVISON & GIBERT
Attorneys for the Petitioners

.....
HUGH W. GIBERT

.....
RICHARD N. HUBERT

.....
R. C. FREEMAN, III

2709 First National Bank Tower
Atlanta, Georgia 30303
(404) 525-6141

Certificate of Service

I, Hugh W. Gibert, counsel for Petitioners, hereby certify that I have this date served a copy of this Petition for Writ of Certiorari upon opposing counsel by mailing a copy of the same to attorney of record, properly addressed and with sufficient postage.

This 27th day of April, 1971.

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Hugh W. Gibert

APPENDIX A

In the
United States Court of Appeals
For the Fifth Circuit

No. 29638

Atlanta and West Point Railroad Company and
Western Railway of Alabama,—
Plaintiffs-Appellees,

versus

United Transportation Union, an Unincorporated
Labor Union, and C. M. Cagle, etc.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Georgia

(February 19, 1971)

Before Bell, Dyer and Roney,
Circuit Judges

DYER, Circuit Judge: The United Transportation Union appeals from the District Court's order preliminarily enjoining a strike during a labor dispute with the Atlanta and West Point Railroad and the Western Railway of Alabama.[1] Essentially the union contends that these railroads had no standing to seek, and the District Court had no power to issue, an injunction

[1] The District Court's Order is reported at 307 F. Supp. 1205.

because the carriers had not complied with the Norris-LaGuardia Act § 8, 29 U.S.C.A. § 108,[2] or the Railway Labor Act §§ 2, Third, and 6, 45 U.S.C.A. §§ 152, Third, 156.[3] We affirm.

The dispute *sub judice* evolves from the often hostile milieu and fiery history of union-management relationships in the railroad industry: the incipiency of

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[2] Section 8 of the Norris-LaGuardia Act provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

29 U.S.C.A. § 108.

[3] Section 2 of the Railway Labor Act provides in pertinent part:

> Third: Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. . . .
>
> . . . . . .
>
> Seventh. No carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title [section 6 of the Act].

45 U.S.C.A. §§ 152, Third, Seventh. Section 6 of the Act provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . by the Media-

conflict between the firemen[4] and the railroads loosely coincided with the birth of Rudolf Diesel more than a century ago. *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry.*, 5 Cir. 1969, 411 F.2d 320, 321. We need not here repeat the historical narrative which others have already published. *E.g., Brotherhood of R.R. Trainmen v. Akron & Barberton Belt RR.*, D.C. Cir. 1967, 385 F. 2d 581, 588-92, *cert. denied*, 1968, 390 U.S. 923. Instead, we shall confine our explication to events comprising the factual context of this particular controversy.

On November 15, 1965, the Brotherhood of Locomotive Firemen and Enginemen served upon the Atlanta and West Point Railroad and the Western Railway of Alabama three section 6 notices[5] proposing changes in the existing collective bargaining agreement. The present controversy is concerned primarily with Notice 3, which pertained to establishment of an apprentice-engineer training program for firemen.

Responding to the union's proposals, the railroads scheduled a conference. During this and subsequent meetings, they contended that the union's requests were "premature, unlawful, and non-bargainable."[6] Later,

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tion Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

45 U.S.C.A. § 156.

[4] The United Transportation Union's predecessor, the Brotherhood of Locomotive Firemen & Enginemen, negotiated the current collective bargaining agreement between the firemen and these railroads in 1957. 307 F. Supp. at 1207.

[5] See note 3 *supra*.

[6] The railroads asserted that they could not negotiate with respect to these notices while Award 282 was in effect. For discussion of this congressionally inspired award and refutation of the railroad's position, *see Brotherhood of R.R. Trainmen v. Akron & Barberton Belt R.R., supra*.

however, management expressed willingness to begin preliminary discussions but, viewing all notices served on November 15 as constituting a single section 6 notice, insisted on concurrent consideration of the railroads' counterproposal of January, 1966.[7] The union rejected this invitation, since it deemed the notices mutually independent. Indeed, on February 22, 1966, T. F. Carr, general chairman of the union's local grievance committee, stated in a letter to Marshall L. Bowie, the carriers' personnel director, that conferences concerning the union's proposals had been terminated prior to that date and could not be reopened. Although Carr later modified his position with regard to the training program, the record discloses no formal attempt to reopen negotiations. Consequently the merits of Notice No. 3 have never been discussed.

The District Court found that, at one time or another, both parties refused to resume negotiations concerning the bargainability of Notice No. 3. The court plausibly concluded that the hiatus resulted because all concerned were awaiting the outcome of litigation, instituted by other unions and other carriers, to determine the bargainability of Notice No. 3. Necessarily antecedent to the resolution of this issue was an answer to the question whether any union—the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Locomotive Engineers were specifically concerned—possessed the exclusive right to contractually arrange an apprentice-engineer program with the carriers. Finally, in *Brotherhood of Locomotive Firemen & Enginemen v. National Mediation Board*, D.C. Cir. 1969, 410 F.2d 1025, 1032, *cert. denied*, 396 U.S. 878, the District of Columbia Circuit held "that the Firemen's Section 6 notice concerning engineer apprenticeship

[7] The railroads' counterproposal is of no moment to the ultimate resolution of this controversy.

programs . . . was bargainable under the Railway Labor Act."[8]

On November 7, 1969, little more than two weeks after the Supreme Court denied certiorari in the above case, the National Railway Labor Conference, which represents the railroads involved here and other carriers, sent the United Transportation Union a written offer to negotiate, and suggested a time and place for the meeting. The Union's international president replied on November 12 that the union was not prepared to consider the matter on a national basis. He concluded that the "suggestion for a meeting [concerning Notice No. 3 should] be sent to the General Chairmen of those General Committees which served that Notice." On November 14, the union's international vice-president arrived in Montgomery, Alabama. On November 15, he informed the general chairman of the union on the Atlanta and West Point Railroad and the Western Railway of Alabama that a strike would commence at 6:00 a.m. that morning.

The strike was short-lived. During the evening of November 15, the District Court for the Northern District of Georgia issued a temporary restraining order. That order was continued by consent of the parties until December 4. Following a hearing on that date, the temporary order remained in force pending issuance of the court's ruling. On January 5, 1970, the court decided that the union had mistakenly treated "the abortive discussions between the parties *about* negotiations as a substitute *for* negotiations and as an exhaustion of the procedural re-

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[8] During the summer of 1969, the Brotherhood of Locomotive Engineers served these railroads with a section 6 notice indicating their desire to bargain concerning an apprentice-engineer program. The railroads and the Engineers subsequently entered a bargaining agreement based upon that union's proposal. 307 F. Supp. at 1207. Implementation of the agreement was scheduled for November 1969.

quirements of the RLA so that it now may strike." 307 F. Supp. at 1210. According to the district judge, the Railway Labor Act requires good-faith negotiations as a prerequisite to the exercise of self-help by either party. Therefore, the carriers must be enjoined from refusing to negotiate and from refusing to comply with the Act's other mandatory provisions; and the union must be enjoined from striking pending such compliance, unless in the meantime the carriers should unilaterally alter existing working conditions or otherwise disturb the *status quo*. *Id.* at 1211. The court concluded:

> Accordingly, an injunction will issue against the union until the statutory procedures have been followed and until further order of the court, and both parties shall proceed forthwith to make a good-faith effort to settle in conference their differences with regard to all bargainable proposals for changes which the union served upon plaintiffs [railroads] in November 1965.

Id. at 1212.

Appealing this order pursuant to 28 U.S.C.A., § 1292 (a)(1), the union argues that the District Court erred both in its findings of fact and in its application of the law. The appeal rests on three grounds: First, the four year delay between the union's section 6 notices and the railroads' offer to negotiate conclusively indicates that the carriers have not made "every reasonable effort" to settle the dispute, a requirement of the Norris-LaGuardia Act, section 8. Having failed to satisfy this condition precedent, the railroads had no standing to seek injunctive relief. Second, because the carriers unilaterally changed one of the terms or conditions of the firemen's employment in violation of the Railway Labor Act, section 6, the Norris-LaGuardia Act, section 8, precluded any injunction against the strike. Finally, by negotiating with the En-

gineers rather than the Firemen with regard to the apprentice-engineer program, the railroads attempted to "interfere with, influence, or coerce" their employees in violation of the Railway Labor Act, section 2, Third. The District Court's order rewarded the railroads for engaging in such illegal activity. We find each of these conclusions untenable.

Section 4 of the Norris-LaGuardia Act, 29 U.S.C.A., § 104, specifically provides: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute . . .". By its terms this prohibition is absolute. Nevertheless, the Supreme Court has recognized a duty to reconcile the policies underlying the Norris-LaGuardia Act with those underlying the Railway Labor Act. *E.g., Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 1957, 353 U.S. 30, 40-42; *Virginian Ry. v. System Federation No. 40*, 1937, 300 U.S. 515; 563; *see Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 1970, 398 U.S. 235, 251-52. Recently the Court noted:

> The heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor, "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."
>
> The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. . . . While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*.

Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 1969, 394 U.S. 369, 377-78; *see Detroit & Toledo*

Shore Line R.R. v. United Transportation Union, 1969, 396 U.S. 142; *National Airlines, Inc. v. International Association of Machinists & Aerospace Workers*, 5 Cir. 1969, 416 F.2d 998, 1000-1002; *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 5 Cir. 1968, 400 F.2d 320, 323-24; *cert. denied*, 1969, 395 U.S. 905; *cf. Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R., supra* (minor dispute). That a major goal of the Railway Labor Act is the prevention of workstoppages in the transportation industry should not require reiteration. *See, e.g., Texas & New Orleans R.R. v. Brotherhood of Ry. & Steamship Clerks*, 1930, 281 U.S. 548, 561; *United Industrial Workers v. Board of Trustees of Galveston Wharves, supra* at 329. "[The] procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Ry. & Steamship Clerks v. Florida East Coast Ry.*, 1966, 384 U.S. 238, 246; *accord, Brotherhood of R.R. Trainmen v. Akron & Barberton Belt R.R., supra* at 597.

By striking, the union unquestionably altered the *status quo*. To effectuate the policies of the Railway Labor Act, the District Court had jurisdiction to provide temporary injunctive relief until the disputants had exhausted the Act's procedures. *Piedmont Aviation, Inc. v. Air Line Pilots Association*, 4 Cir. 1969, 416 F.2d 633, 636, *cert. denied*, 1970, 397 U.S. 926; *see Long Island R.R. v. System Federation No. 156*, 2 Cir. 1966, 368 F.2d 50, 52-53; *Flight Engineers' International Association v. American Airlines, Inc.*, 5 Cir. 1962, 303 F.2d 5, 11; *Pennsylvania R.R. v. Transport Workers Union*, E.D. Pa. 1962, 202 F. Supp. 134, 137-38; *cf. R.R. Yardmasters v. Pennsylvania R.R.*, 3 Cir. 1955, 224 F.2d 226. Undeniably, when the union struck, the parties had exhausted none of the Act's procedures. Discussions concerning the bargainability

of Notice No. 3 were not a satisfactory substitute for negotiations concerning the merits of that notice. Consequently validity of the court's exercise of jurisdiction does not hinge upon classification of the dispute as either "major" or "minor."[9] *See, E.g., Piedmont Aviation, Inc. v. Airline Pilots Association, supra.* In either event, under the circumstances of this case, the District Court properly assumed jurisdiction.

The union, however, argues that although the court may have had jurisdiction, it had no power to provide temporary injunctive relief. Relying on *Brotherhood of R.R. Trainmen, Enterprise Lodge No. 27 v. Toledo, Peoria & Western R.R.*, 1944, 321 U.S. 50, and *United Industrial Workers v. Board of Trustees of Galveston Wharves, supra,* the union contends that the carriers lacked the "clean hands" necessary to gain an injunction. Thus section 8 of the Norris-LaGuardia Act precluded such a

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[9] The "major"-"minor" distinction evolved from *Elgin, Joliet & Eastern Ry. v. Burley*, 1945, 325 U.S. 711, 722-23. It is not articulated in the Railway Labor Act. Judge (now Mr. Justice) Marshall has stated:

> The words "major" and "minor" have no intrinsic legal significance. They are derived from the terminology of railway industrial relations and are used judicially merely as a shorthand way of referring to a distinction incorporated in the structure of the Railway Labor Act. The statute, itself, however, does not use the words. The distinction is of legal significance solely because the Act establishes mutually exclusive mandatory procedures to be followed in resolving two different kinds of disputes.

Rutland Ry. v. Brotherhood of Locomotive Engineers, 2 Cir. 1962, 307 F.2d 21, 42-43 (dissenting opinion), *cert. denied*, 1963, 372 U.S. 954.

The courts have provided sundry interpretations of the distinction between the two types of dispute. *See, e.g, Railway Express Agency, Inc. v. Brotherhood of Railway, Airline & Steamship Clerks*, 5 Cir. 1971, ... F.2d ... [No. 29256, Jan. 25, 1971]. *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 5 Cir. 1965, 351 F.2d 183, 188-189; *St. Louis, San Francisco & Texas Ry. v. R.R. Yardmasters*, 5 Cir. 1964, 328 F.2d 749, 752-53, *cert. denied*, 377 U.S. 980; *Rutland Ry. v. Brotherhood of Locomotive Engineers, supra* at 33-34.

remedy. To substantiate its claim, the union avers that the railroads' agreement with the Brotherhood of Locomotive Engineers regarding an apprentice-engineer program[10] was a unilateral change in the terms or conditions of the firemen's employment which violated section 6 of the Railway Labor Act. Moreover, this agreement was a manifestation of the carriers' efforts to destroy the firemen's union, a violation of section 2, Third, of the Railway Labor Act. If either of these observations was factually supportable, the union arguments might have merit.

In *Enterprise Lodge No. 27, supra,* a union struck after negotiation and mediation had failed and the railroad had refused to arbitrate. The Supreme Court held that section 8 of the Norris-LaGuardia Act prohibited an injunction to terminate the strike: "Arbitration under the Railway Labor Act was available, afforded a method for settlement Congress itself had provided, and until [the railroad] accepted this method it had not made 'every reasonable effort to settle' the dispute, as § 8 requires." 321 U.S. at 65. The Court noted:

> [Section 8] imposes two conditions. If a complainant has failed (1) to comply with any obligation imposed by law or (2) to make every reasonable effort to settle the dispute, he is forbidden relief. . . .
>
> . . . Section 8 is not limited to railway labor disputes. But it includes them. And its very terms show they were used in explicit contemplation of the procedures and machinery then existing under the Railway Labor Act and with the intent of making their exhaustion conditions for securing injunctive relief, not singly or alternatively, but conjunctively or successively, when available.

Id. at 56-58 (footnote omitted). To fortify its holding, the Court relied partly on congressional debates preced-

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[10] See note 8 *supra.*

ing passage of the Norris-LaGuardia Act. Representative LaGuardia, who sponsored the bill in the House, commented:

> [T]here is [a] tie-up between the provisions of the railroad labor act and the necessity of exhausting every remedy to adjust any difference which might arise. The workers could not and would not think of going on strike before all of the remedies provided in the law have been exhausted. If the railroads have complied, they would not . . . be deprived of any relief which they may have in law or equity.

75 Cong. Rec. 5504. Crucial to the Court's rationale is the fact that at the time the railroad sought to enjoin the strike, it was also refusing to arbitrate. Thus the union had exhausted every available avenue to agreement and was free to resort to self-help, whatever the consequences. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., supra* at 377-80; *Brotherhood of Ry. & Steamship Clerks v. Florida East Coast Ry., supra* at 243-44; *Brotherhood of Locomotive Engineers v. Baltimore Ohio R.R.*, 1963, 372 U.S. 284, 289-91; *Elgin, Joliet & Eastern Ry. v. Burley*, 1945, 325 U.S. 711, 725.

In *Order of R.R. Telegraphers v. Chicago & Northwestern Ry.*, 1960, 362 U.S. 330, the Court upheld a district court's decision that section 8 of the Norris-LaGuardia Act had deprived it of the power to permanently enjoin a strike. The district court had found that the complainant railroad was engaged in a continuing refusal to bargain concerning the subject matter of a section 6 notice. Furthermore, the union had exhausted every procedure available under the Railway Labor Act.

To the extent that the union relies on *Galveston Wharves, supra,* to buttress its section 8 argument, it is mistaken. Judge Wisdom, writing for this Court, con-

cluded that the Norris-LaGuardia Act was inapplicable to the *Galveston Wharves* controversy. 400 F.2d at 331 n. 33. Moreover, with regard to the Railway Labor Act, *Galveston Wharves* does not deviate from the rationale of *Enterprise Lodge No. 27, supra*, and its progeny. It is true that even though bargaining had not begun, this Court upheld a union's right to strike pending the carrier's compliance with the Act. Nevertheless, the factual underpinning for this decision cannot be overlooked: the carrier had leased facilities and discharged employees without notice, thereby destroying the *status quo* in violation of the Act. Consequently, "under the Act, the Union had the right to strike; that right continues until the Act is complied with by the Carrier, and thereafter ceases during and until exhaustion, of the procedures set up by the Act." 400 F.2d at 333; *see Detroit & Toledo Shore Line R.R. v. United Transportation Union, supra* at 150-55. In *National Airlines, Inc. v. International Association of Machinists Aerospace Workers, supra,* this Court again noted that the union's right to strike is terminable when the carrier has complied with the Act. Applying the *Galveston Wharves* rationale to the facts in that case, Judge Thornberry wrote:

> [I]t is conceivable that the strike at the time of the first hearing was lawful. The Union, however, did not contest the initial strike injunction. In any event, the Carrier promptly complied with the January 18 temporary restraining order, issued contemporaneously with the strike injunction, and was therefore in compliance with the Act. The strike, however, continued and was, therefore, even under the *Galveston Wharves* rationale, in violation of the Act and properly enjoinable from that point forward, if not before.

416 F.2d at 1003 n. 4; *see Rutland Ry. v. Brotherhood of Locomotive Engineers,* 2 Cir. 1962, 307 F.2d 21, 39 n. 11; *cert. denied,* 1963, 372 U.S. 954.

In the case *sub judice*, we fail to discern why section 8 of the Norris-LaGuardia Act should have deprived the District Court of power to issue a temporary injunction. Application of section 8 would have contributed nothing, under these circumstances, to reconciliation between the Norris-LaGuardia Act and the Railway Labor Act. Instead, it would have served merely to emasculate the latter. Neither *National Airlines, supra,* nor *Galveston Wharves, supra,* demands, or sanctions, such disregard for the legislative goals of the Railway Labor Act. Indeed, assuming *arguendo* that the railroads alone were culpable for the four year delay between delivery of Notice No. 3 and their offer to bargain, that they were ready to negotiate at the time the union struck remains uncontroverted. Since the disputants had not exhausted the procedures established by the Railway Labor Act, *Galveston Wharves, supra,* and *National Airlines, supra,* required that the strike be enjoined. The District Court, cognizant of its duty, refused to shirk the responsibility: its *quid pro quo* injunction ensured not only that the work stoppage would end but also that the railroads would negotiate in good faith. The court's order did not foreclose future self-help, once the Act's procedures were exhausted or a violation of the Act occurred.[11]

Furthermore, we fail to perceive how the railroads' agreement with the Engineers concerning an apprentice-engineer program changed the terms or conditions of the firemen's employment, and thus justified the strike. At the time they exercised self-help, the Firemen had not even begun to negotiate concerning the merits of their proposed program, nor had the Engineers tried to include firemen in their program. Therefore, it was too early to

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[11] *See generally* Risher, "The Railway Labor Act," 12 *B.C. Ind. & Com. L.Rev.* 51 (1970); Wimberly, "The Labor Injunction—Past, Present, and Future," 22 *So. Car. L. Rev.* 689, 698-723 (1970).

speculate as to what effect the Engineers' agreement would have on the firemen's traditional expectation of promotion to the job of engineer. For the moment, Rule 37 of the Firemen's collective bargaining agreement with the carriers protected their promotional interest.[12] It follows that there could have been no provable change in the *status quo*. Until the Firemen have negotiated their own training agreement with the railroads, it is even conceivable that the brotherhoods can discard sibling rivalries and implement an apprentice-engineer program satisfactory to all concerned. Such accommodation may not be possible, but it is conceivable.

Finally, it would be ludicrous to hold that the railroads' undertaking of a statutory duty to bargain with the Engineers constituted an attempt to "interfere with, influence, or coerce" firemen, a violation of the Railway Labor Act Section 2, Third. The record shows that the carriers negotiated with the Engineers in response to a Section 6 notice. To say that the performance of this legal obligation was illegal is a *non sequitur* to which we cannot subscribe. That the railroads may have been derelict in their duty to bargain with the Firemen concerning a similar section 6 notice is irrelevant to our resolution of this issue.

Concurring in *Brotherhood of Locomotive Firemen & Enginemen v. National Mediation Board, supra,* Judge (now Chief Justice) Burger stated:

> Today's result places the carriers in the unhappy position of having to deal simultaneously with two rival unions whose bargaining demands will very likely conflict if a high order of union statesmanship is not forthcoming. Moreover, since both Unions have

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[12] Rule 37 provides that firemen shall be afforded an opportunity for promotion to engineers after they have passed required examinations and met prescribed standards.

> now been given the right to serve Section 6 notices, the disappointed Union will have the right to strike once the statutory procedures are exhausted. The Carriers will be able neither to avoid nor to resolve a strike by agreeing with the striking union without the risk of violating its obligation not to depart unilaterally from its agreement with the other Union. Although I consider this to be a wholly unsatisfactory resolution I can find nothing in the statute which permits the Court to impose a different result.

410 F.2d at 1035; *cf. Transportation-Communication Employees Union v. Union Pacific R.R.*, 1966, 385 U.S. 157; *Slocum v. Delaware, Lackawanna & Western R.R.*, 1950, 339 U.S. 239; *Order of Ry. Conductors v. Pitney*, 1946, 326 U.S. 561, 567. *The Railway Labor Act and National Mediation Board, supra*, have impaled the carriers on the horns of a bargaining dilemma.[13] Now the union asks us to inform these railroads that one horn is legally more comfortable than the other. This we refuse to do. While *National Mediation Board, supra*, vindicated the union's right to bargain with regard to Notice No. 3, it did not give the Firemen an exclusive right to negotiate an ap-

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[13] Concerning the equities of the *National Mediation Board* decision Chief Judge Brown has remarked:

> This sequel concerns the internecine, intramural, probably non-fraternal dispute between the two Brotherhoods as to which gets the Apprentice Engineer craft and the dilemma facing the Carriers in recognition and bargaining. With the collective apologia of the Court's principal spokesman, Judge J. Skelly Wright, and special sentiments of Judges Burger and Tamm, the Court may itself be giving its decision the characterization that it is bound to be right because it is so wrong in result.

Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry., 5 Cir. 1969, 411 F.2d 320, 322, n. 1. Others have argued that the Railway Labor Act itself needs repair and have recommended alternative legislation. *See* Risher, *supra* note 11; Silberman, "National Emergency Disputes—The Considerations Behind a Legislative Proposal," 4 *Ga. L.Rev.* 673 (1970).

prentice-engineer program, nor did it authorize self-help prior to exhaustion of the Act's procedures.

Accordingly, we conclude that the District Court did not abuse its discretion when it preliminarily enjoined the strike in question. *See Piedmont Aviation, Inc. v. Air Lines Pilots Association, supra; Flight Engineers' International Association v. American Airlines, Inc., supra* at 11; *cf. Seaboard World Airlines, Inc. v. Transport Workers Union,* 2 Cir. 1970, 425 F.2d 1086, 1091-92. On November 15, 1969, neither party had the right to resort to self-help to resolve this dispute. *See Flight Engineers' International Association v. American Airlines, supra; cf. Northern Pacific Ry. v. Brotherhood of Locomotive Engineers,* D. Minn. 1970, 308 F. Supp. 995, 997-98. The District Court's order is

AFFIRMED.

APPENDIX B

Atlanta & West Point R. Co. v. United Transportation Union

Cite as 307 F.Supp. 1205 (1970)

Atlanta and West Point Railroad Company and Western Railway of Alabama

v.

United Transportation Union, an Unincorporated Labor Union, and C. M. Cagle, 1999 Meador Avenue, S.E., Atlanta, Georgia, Individually, and as Representative of Such Class.

Civ. A. No. 13269.

United States District Court
N. D. Georgia,
Atlanta Division.

Jan. 5, 1970.*

Action by railroads to enjoin railway labor union and its members from engaging in allegedly unlawful picketing and work stoppage. The District Court, Edenfield, J., held that railroads' action, after union representing firemen had served notice relating to establishment of an apprentice-engineering training program, in negotiating training program with union representing engineers did not constitute a change in status quo under firemen's collective bargaining agreement providing that firemen shall be afforded an opportunity for promotion to engineers and did not, of itself, justify firemen's use of self-help.

Injunction issued.

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* On September 12, 1969, in Memorandum Decision, No. 13,603, the Fourth Circuit affirmed the Order of this Court denying habeas corpus relief to Taylor.

1. Labor Relations Key 289, 295

Railroads' action, after union representing firemen had served notice relating to establishment of an apprentice-engineering program, in negotiating training program with union representing engineers did not constitute a change in status quo under firemen's collective bargaining agreement providing that firemen shall be afforded an opportunity for promotion to engineers and did not, of itself, justify firemen's use of self-help in the form of picketing and work stoppage. Railway Labor Act §§ 1 et seq., 2, subd. 7, 6, 45 U.S.C.A. §§ 151 et seq., 152, subd. 7, 156.

2. Labor Relations Key 263

Provision of Railway Labor Act that no carrier shall change pay, rules or work conditions as embodied in agreements except as provided by statute applies only to changes in existing agreements and does not prevent changes in existing working conditions not embodied in agreements. Railway Labor Act, § 2, subd. 7, 45 U.S.C.A. § 152, subd. 7.

3. Labor Relations Key 263

Status quo duties under Railway Labor Act prevent changes in existing working conditions whether they are covered by existing agreement or not, once the major dispute machinery of the Act has been set into motion. Railway Labor Act, §§ 5, 6, 10, 45 U.S.C.A. §§ 155, 156, 160.

4. Labor Relations Key 263

Neither provision of Railway Labor Act barring changes in pay, rules or work conditions embodied in agreements except as provided in Act nor any of the status quo sections are applicable unless change complained of is a change in a condition which exists at time dispute arises. Railway Labor Act, §§ 2, subd. 1, 5, 6, 10, 45 U.S.C.A. §§ 152, subd 7, 155, 156, 160.

5. Labor Relations Key 940

Evidence established that both railroads, seeking to enjoin labor union from picketing and work stoppage, and union refused to bargain on issue of establishment of apprentice training program prior to union's taking self-help. Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.

6. Labor Relations Key 281

Where a major dispute is involved between a railroad and a labor union representing its employees, genuine, good-faith negotiations are required prior to resort to self-help and neither refusal to negotiate, nor an agreement not to negotiate nor dispute about negotiations will suffice. Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.

7. Labor Relations Key 811, 816

Where there had been no negotiations between railroad and labor union relating to establishment of an apprentice training program prior to union's seeking self-help, carriers were enjoined from refusing to negotiate and from refusing to comply with other mandatory provisions of Railway Labor Act and union was enjoined from striking pending such compliance, unless carriers unilaterally altered existing working conditions or otherwise disturbed status quo. Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.

8. Labor Relations Key 858

Norris-LaGuardia Act is no bar to mandatory injunction to compel recalcitrant parties to comply with mandatory provisions of Railway Labor Act. Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.

9. Labor Relations Key 804

If neither party to a major railway labor dispute has bargained in good faith, both are subject to a mandatory injunction compelling negotiation, and self-help by either is unlawful and enjoinable in the meantime. Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.

10. Labor Relations Key 263

Where union representing firemen had filed notice relating to establishment of an apprentice-engineer training program prior to time railroads negotiated apprentice-engineer training program with union representing engineers, carriers were under continuing duty, pending bargaining under notice, from unilaterally changing conditions under which firemen had been promoted to engineers and carrier could not require that firemen participate in training program carriers had negotiated with engineers' union. Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.

Lamar W. Sizemore, and William H. Major, Heyman & Sizemore, Atlanta, Ga., for plaintiffs.

Hugh Gibert and Richard N. Hubert, Haas, Holland, Freeman, Levison & Gibert, Atlanta, Ga., for defendants.

Order

Edenfield, District Judge.

This action for injunctive relief was instituted on November 15, 1969, by Plaintiffs Atlanta and West Point Railroad Company and Western Railway of Alabama (hereinafter referred to collectively as A & W P) to enjoin the allegedly unlawful picketing and work stoppage which defendants on that day had instituted on the prop-

erties of plaintiffs and along the lines where plaintiffs' trains are operated. A temporary restraining order issued on November 15th was continued until December 4th by consent of the parties and following a hearing on that date was continued pending issuance of this court's ruling. Defendants' answer and counterclaim for injunctive relief against the carriers were filed on December 16, 1969.

Plaintiffs are carriers engaged in interstate commerce within the meaning of the Railway Labor Act (45 U.S.C. § 151 et seq.). Defendant United Transportation Union (UTU) is an unincorporated labor organization and is the recognized bargaining agent for firemen and certain other railway employees of both plaintiffs. Defendant Cagle is named as a defendant both individually and as a representative of those of plaintiffs' employees who are represented by the UTU.

The dispute between the parties centers around an apprentice-engineer program which the union proposed to the carriers in November 1965, pursuant to § 6 of the Railway Labor Act (45 U.S.C. § 156), and raises questions as to whether (1) the carriers' negotiation of a contract regarding an apprentice-engineer program with another union, after Defendant UTU's § 6 notice was filed, constituted a change in the status quo and therefore justified the use of self-help by defendants, and, if not, as to whether (2) either party's mere refusal to bargaining good faith, standing alone, would justify the use of self-help by the other party.

The record shows that there is an existing collective bargaining agreement which was entered into between plaintiffs and Defendant UTU's predecessor—the Brotherhood of Locomotive Firemen and Engineers (BLFE)—in 1957, and which provides for rates of pay, rules, regulations, and working conditions under which plaintiffs' fire-

men, hostlers, and hostler helpers are employed. Rule 37 of that agreement provides that firemen *shall be afforded an opportunity for promotion to engineers* after they have passed certain required examinations and have met certain prescribed conditions. The agreement was last amended in 1959, but in November 1965 the UTU served notice on plaintiffs of its desire to effect certain changes in the existing contract. The proposed changes were presented in the form of three § 6 notices, all of which were served on the same day, but the present controversy is concerned almost entirely with what is generally referred to as Notice No. 3, relating to the establishment of an apprentice-engineer training program.[1]

[1] The record shows further than during the summer of 1969 the union which represents plaintiffs' engineers, *i. e.*, the Brotherhood of Locomotive Engineers (BLE), also served the carriers with a § 6 notice indicating a desire to bargain with regard to an apprentice-engineer training program and that plaintiffs and the BLE subsequently entered into a bargaining agreement based upon that union's proposal. Defendants now contend that by negotiating with the engineers plaintiffs have altered the status quo with respect to the firemen and thereby have violated § 2, Seventh, of the Railway Labor Act (45 U.S.C. § 152, Seventh), which provides that "No carrier * * * shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title [i. e., § 6 of the Act]." For the

[1] At about the same time, similar notices were served on carriers throughout the country by other local units of the UTU. In subsequent litigation Notices 1 and 3 were judicially determined to present bargainable, and Notice 2 nonbargainable issues. Brotherhood of Railroad Trainmen v. Akron & B.B.R.R., 128 U.S.App. D.C. 59, 385 F.2d 581 (1967); Brotherhood of Locomotive Firemen & Engineers v. National Mediation Board, 133 U.S.App.D.C. 326, 410 F.2d 1025 (1969).

reasons set forth below, the court rejects that contention and finds that the carriers' actions in negotiating this contract do not constitute a violation of the Railway Labor Act.

There is at present no dispute regarding the bargainability of the subject matter contained in defendants' Notice No. 3, but plaintiffs correctly contend that the subject of an apprentice-engineer program is bargainable with both the BLE and the UTU[2] and that their contract with the BLE in no way affects either their ability or their desire to bargain with the UTU on the same subject matter. Having bargained with the engineers, plaintiffs are still free (and indeed have a duty) to bargain with the firemen. Although the apprenticeship agreement which plaintiffs have with the engineers makes certain provisions which could be applicable to firemen if they entered the program under that contract, it is conceivable that after bargaining between the carriers and firemen has taken place an entirely separate apprenticeship agreement will be set up to cover firemen who wish to become apprentices.[3]

[2-4] Furthermore, to the extent that defendants allege that plaintiffs have changed *future* working conditions they have not brought themselves within either § 2, Seventh, of the Act or within any of the sections which set forth the status quo duties imposed by the Act when a

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[2] The Court of Appeals for the District of Columbia made this clear in a recent, related case when it noted that since both the firemen and the engineers have an interest in the training of apprentice engineers, until a carrier has bargained with both groups the National Mediation Board would have no basis upon which to make a craft or class determination with respect to the apprentices. Brotherhood of Locomotive Firemen & Engineers v. National Mediation Board, 133 U.S.App.D.C. 326, 410 F.2d 1025, 1034 (1969).

[3] The actual program might, of course, include employees covered by both agreements.

major dispute is involved. Section 2, Seventh, is not among the latter provisions; it merely states one category of cases in which the major dispute provisions must be invoked. Detroit & Toledo Shore Line Co. v. United Transportation Union, 396 U.S. 142, 90 S.Ct. 294, 24 L.Ed. 2d 325 (Dec. 9, 1969),[4] and it applies only to changes in *existing agreements*. The status quo duties, on the other hand, prevent changes in *existing working conditions*, whether they are covered by the existing agreement or not, once the major dispute machinery of the Railway Labor Act has been set into motion.[5] Neither § 2 Seventh, nor any of the status quo sections (§§ 5, 6, or 10), is applicable unless the change complained of is a change in conditions which existed at the time the dispute arose, *i. e.*, at the time the § 6 notice was served.

To the extent that they allege that plaintiffs' contract with the engineers changes the firemen's *present* work rules the defendants are in error. Even if the terms of the two contracts clearly conflicted, plaintiffs could not change the firemen's working conditions merely by entering into a contract (with another union) which purported to do so; the change of conditions would occur only if and when the carriers undertook to implement such

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[4] "The purpose of § 2, Seventh, is two-fold: it operates to give legal and binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures. The violation of this section is a criminal offense punishable by imprisonment or fine or both. Violations of the status quo provisions of §§ 5, 6, and 10 are only civil wrongs." Detroit & Toledo Shore Line Co. v. United Transportation Union, 396 U.S. 142, 156, 90 S.Ct. 294, 302 (Dec. 9, 1969).

[5] "The obligation of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Id.* 396 U.S. at 152-153, 90 S.Ct. at 300-301.

changes with regard to the firemen. The firemen's interest in becoming engineers is protected by their existing bargaining agreement, Rule 37 of which provides that firemen shall be afforded an opportunity to be promoted to engineers. Despite the apprenticeship agreement which the carriers have negotiated with the engineers, the firemen are free to negotiate their own apprenticeship agreement with the carriers and need never enter the training program under the BLE—carrier agreement if they choose not to do so. There is no evidence whatever that the carriers have made any change in existing working conditions, and it necessarily follows that they have not violated the status quo.

With respect to the second question presented, *i. e.*, the refusal to bargain, all parties agree that bargaining has not yet taken place with regard to the contract changes which were proposed in defendants' November 1965 Section 6 notices, and they also agree that this results from a refusal to bargain.[6] The union, of course, contends that the carriers refused, while the carriers contend that the union refused.

[5] Under the evidence presented the court concludes that at one time or another both refused. Thus although several conferences were held with regard to defendants' Notice No. 3, it is undisputed that at those meetings the merits of the union's proposal were never discussed; instead, the meetings were devoted to discussions as to whether the issue was a bargainable one and, if so, whether the bargaining conferences should simultaneously

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[6] No question of good-faith bargaining is involved. It would be inappropriate to consider, before bargaining has even begun, what effect, if any, the carriers' contract with the engineers might have on the question of good-faith bargaining. Furthermore, the services of the National Mediation Board cannot be invoked until bargaining has taken place and an impasse has been reached (45 U.S.C. § 155.) unless the Mediation Board dockets the case for mediation on the national level as it has been requested to do.

consider all of the union's proposals, and a counterproposal which the carriers had made, or whether the discussion should be confined to the changes proposed in the union's Notice No. 3. With respect to the positions taken by the respective parties during these conferences it also appears, and indeed is undisputed, that although the carriers initially took the position that the union's combination proposal of November 15, 1965, was "premature, unlawful, and non-bargainable," they later expressed willingness to begin preliminary discussions on the union's November 15th proposals.[7] The carriers viewed all notices served by the union on November 15th as constituting a single § 6 notice and insisted upon their right to discuss concurrently both that notice and their own counterproposal of January 1966. The union, on the other hand, viewed each notice as entirely independent of the others and refused to discuss them concurrently. This conflict was never resolved and the evidence shows that at least as early as February 22, 1966, Mr. T. F. Carr, General Chairman of the union's local Grievance Committee, stated in a letter to Mr. Bowie, the carriers' Director of Personnel, that conferences on the union's proposals had been terminated some time prior to that date and could not be reopened.

The union now contends, however, that the carriers have been in violation of the Railway Labor Act since November 1965 in that they have consistently refused to bargain with regard to their § 6 Notices No. 1 and No. 3. Notice No. 2, of course, has been held nonbargainable and is not at issue here.

In the first place, and to the extent that it makes any difference, the court cannot completely agree that, under

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[7] Letter dated January 31, 1966, from Marshall L. Bowie, Director of Personnel and Assistant to General Manager of both railroads, to T. F. Carr, General Chairman of UTU's predecessor (BLFE).

the evidence, it was the carriers which have consistently refused to bargain with respect to the defendant union's § 6 notice. It is true that when the § 6 notice was first served in 1965[8] these carriers along with other carriers, took the position that the issue was a nonbargainable one. In fact, certain of the other carriers along with other unions caused litigation to be instituted to resolve this question and a judgment was ultimately entered finding in favor of bargainability.[9] While this litigation was pending it appears that all parties held off awaiting the outcome, but even before the litigation was over it also appears that the plaintiff carriers here wrote the defendant union expressing willingness to begin negotiations if all notices (both proposals and counterproposals) could be considered together (see letter of 1/31/66 referred to in fn. 7, supra). Thereafter on February 22, 1966, the union replied, rejected this offer and saying that conferences on the union's proposals had been terminated some time prior to that date and could not be reopened. As respects formal (written) offers to negotiate there the matter rested on both sides until the strike was called on November 15, 1969, some three years and nine months later.[10]

[6] In view of the court, however it makes no difference who first refused to negotiate in any event. Apparently the defendant union would now treat the abortive discussions between the parties *about* negotiations as a

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[8] The court makes no finding as to the viability of a § 6 notice served in 1965 as respects a strike based thereon nearly four years later in 1969. In view of the other findings in this opinion, the court treats the notice as still being valid.

[9] *See* Brotherhood of Locomotive Firemen & Engineers v. National Mediation Board, 133 U.S.App.D.C. 326, 410 F.2d 1025, *supra*.

[10] It is true, however, that at the hearing the head of the union did testify that thereafter at one or more chance meetings he did orally mention further negotiations which were refused.

substitute *for* negotiations and as an exhaustion of the procedural requirements of the RLA so that it now may strike. This view, however, misconceives the entire scheme of the Railway Labor Act. What the Act positively requires, where a major dispute is involved, is genuine, good-faith negotiations, and neither a refusal to negotiate, nor an agreement not to negotiate nor a dispute about negotiations will suffice. If either party refuses to negotiate it may be compelled to do so by mandatory injunction. This is necessarily true, else the whole elaborate "cooling-off" procedures set up by the Act could be set at naught at the whim of either party, disrupting interstate commerce and fomenting the very evils which the Act was designed to prevent.

As the Fifth Circuit held in its most recent opinion, in which it concluded that unlawful self-help by one party does not automatically justify retaliatory self-help by the other party:

> "The cooling-off policies of the major dispute procedures cannot be effectuated by allowing both parties simply to do away with the Act."[11]

This appears to be the holding of all the cases. Thus as one court has said:

> "* * * [T]he Railway Labor Act imposes a mandatory duty upon both carrier and union to follow its procedures in the case of major disputes. *While agreement is not compulsory the steps required by the Act are.* In the event that either party refuses to follow them it has failed to follow the plain mandate of Congress and has breached the duty which Congress imposed upon it. Injunctive relief is required to 'vindicate' [the Act] * * *." (Emphasis

[11] National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers, 416 F.2d 998 (1969).

added.) American Airlines, Inc. v. Air Line Pilots Ass'n. D.C., 169 F.Supp. 777, 787 (cited by 5th Cir. in United Industrial Workers, etc., v. Board of Trustees, etc., 400 F. 2d 320).

This also accords with the statement of Judge (now Mr. Justice) Marshall that:

> "'The legislative history (of the Railway Labor Act) indicates that when the rail unions and carriers agreed upon these provisions, the unions surrendered their rights to strike pending exhaustion of major dispute procedures in exchange for a statutory provision restraining management from disturbing the status quo.'" Rutland Ry. Corp. v. Brotherhood of Locomotive Engineers (2nd Cir. 1962), 307 F.2d 21, 43, quoted by Fifth Circuit in United Industrial Workers, etc. v. Board of Trustees, etc., 400 F.2d 320 at 323.

[7] It follows that, there having admittedly been no negotiations, they must be begun; and in the meantime the Act must be "vindicated". That is to say, the carriers must be enjoined from refusing to negotiate and from refusing to comply with the other mandatory provisions of the Act and the union must be enjoined from striking pending such compliance, unless in the meantime the carriers should unilaterally alter existing working conditions or otherwise disturb the status quo.

[8, 9] Nothing in the Norris-LaGuardia Act bars such relief. That Act does not bar the issuance of mandatory injunctions to compel recalcitrant parties to comply with the mandatory provisions of the Act.[12] Nor does it bar

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[12] *See, e. g.*, Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952); Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957).

injunction against unlawful self-help by either party pending compliance therewith.[13] Under the Act, parties to a major dispute have a right to use self-help once the Act's mandatory procedures have been exhausted.[14] But self-help is lawful only if the party using it has complied with those provisions; if it has not done so the self-help is unlawful and may be enjoined despite the Norris-LaGuardia Act.[15]

Nor do the cases in which an injunction was denied militate against this conclusion. Thus in both America Airlines, Inc. v. Air Line Pilots Ass'n, supra, and in Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western R. R., 321 U.S. 50, 64, S.Ct. 413, 88 L.Ed. 534 (cited by defendants), the strike came *after* protracted negotiations, not *before*, and an injunction against the strike was consequently denied. Finally, in United Industrial Workers of Seafarers, etc. v. Board of Trustees, etc., supra, an injunction was denied because there the carrier had changed existing working conditions and disturbed the status quo by selling its facilities and discharging certain employees. Under these circumstances, of course, the strike was legal and could not be enjoined. In short, the conclusion is inescapable that these cases in no way alter the rule that if neither party to a major dispute has bargained in good faith, both are subject to a mandatory injunction compelling negotiation and that

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[13] United Industrial Workers of Seafarers Intl. v. Board of Trustees of Galveston Wharves, 400 F.2d 320 (5th Cir. 1968), cert. denied, 395 U.S. 905, 89 S.Ct. 1747, 23 L.Ed.2d 219 (1969); American Airlines, Inc. v. Air Lines Pilots Ass'n Intl., 169 F.Supp. 777 (S.D.N.Y.1958).

[14] Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969).

[15] *Id.*; American Airlines, Inc. v. Air Lines Pilots Ass'n Intl., 160 F.Supp. 777 (S.D.N.Y.1958).

self-help by either would be unlawful and enjoinable in the meantime.

Applying the foregoing facts of the instant case, in which the parties agree that no bargaining has in fact taken place but with each party asserting that it was the other party who refused to bargain, one fact at least is crystal clear, *i. e.*, the bargaining which the Railway Labor Act requires has never materialized and as a result disruption of commerce is threatened. Assuming for the moment that it was the plaintiffs who refused to bargain, absent a unilateral change in the status quo by the plaintiffs, the defendants would not be entitled to use coercive self-help, although they clearly are entitled to a mandatory injunction compelling the carriers to confer. The court has rejected defendants' contention that the carriers changed the status quo by bargaining with the engineers' union regarding a matter which has been held bargainable as to both the engineers and the fireman,[16] and there is no allegation that the carriers have changed the status quo in any other manner.

[10] Holding as we do that the carriers' mere refusal to bargain, standing alone, would not provide a lawful basis for a strike, it follows that we need not decide which party is the culprit, or indeed whether both parties have failed to fulfill their statutory obligation to confer. The court notes, however, that under their existing bargaining agreement with the firemen the carriers are under a continuing duty to promote all qualified firemen to engineers and the conditions under which the firemen have been promoted must not be changed unilaterally, whether provided for in the existing agreement or not.

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16 Brotherhood of Locomotive Firemen & Engineers v. National Mediation Board, 133 U.S.App.D.C. 326, 410 F.2d 1027, 1033, 1034 (1969).

Detroit & Toledo Shore Line Co. v. United Transportation Union, supra. It follows, therefore, that the firemen may not be required to participate in the training program which the BLE and carriers have negotiated. On the other hand, the union—having filed notice in November 1965 of several areas in which it wishes to bargain—cannot now insist that each area must be negotiated without reference to the other, unless of course notice has been withdrawn as to the areas about which it does not now wish to bargain.

Accordingly, an injunction will issue against the union until the statutory procedures have been followed and until further order of the court, and both parties shall proceed forthwith to make a good-faith effort to settle in conference their differences with regard to all bargainable proposals for changes which the union served upon plaintiffs in November 1965.

It is so ordered.

APPENDIX C

Railway Labor Act

§ 152. General duties—Duty of carriers and employees to settle disputes

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner

to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefore, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Change in pay, rules, or working conditions contrary to agreement or to section 15C forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

Norris-La Guardia Act

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent in-

junction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

§ 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

1970—169

No. 1707

UNITED TRANSPORTATION UNION, an Unincorporated Labor Union, and
C. M. CAGLE,
Petitioners,

v.

ATLANTA AND WEST POINT RAIL ROAD COMPANY and
WESTERN RAILWAY OF ALABAMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

LAMAR W. SIZEMORE
WILLIAM H. MAJOR
RALPH G. McCALLUM, JR.
310 Fulton Federal Building
Atlanta, Georgia 30303
Attorneys for Respondents

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The statement in the petition on this subject is adequate.

JURISDICTION

The jurisdictional statement in the petition is adequate.

QUESTIONS PRESENTED

The issues presented on this appeal fall into three major categories: (1) the status of the issue in this court, (2) the applicable substantive law governing the merits, and (3) whether the facts before the lower court warranted the granting of preliminary injunctive relief to an extent such that this Court may not declare the District Court abused its discretion.

The first category in turn may be subdivided:

A. Have facts occurring subsequent to the order appealed from of January 5, 1970 made the issue moot, firstly because the condition subsequent upon which the injunction was to terminate has occurred, and if no order has been issued vacating the injunction against the Union's striking, it is due solely to the failure of the Union to properly present the matter to the District Court; or alternatively, because the parties have completely settled the dispute which was the origin of the present litigation.

B. Whether the Union's appeal of only part of an injunction may be heard when it has acquiesced in and accepted the benefit of the remainder of the injunction, and the injunction is in fact a unit whose components are not subject to such selective severance.

The second and third major questions may be combined and put with more precision:

Whether the District Court has jurisdiction under the Railway Labor Act to enjoin the strike of a railroad union against a railroad over a possible "major dispute," or does Section 4 of the Norris-LaGuardia Act deprive the court of jurisdiction; and if so (i) what legal parameters limit and govern the exercise of such jurisdiction by a United States District Court, and (ii) whether the District Court was so clearly erroneous in its application of the facts to

the controlling law that its judgment should be reversed, or alternatively (iii) if the court was under any erroneous impression as to the law, whether the undisputed facts upon which the court could have acted otherwise support the granting of injunctive relief.

STATUTES INVOLVED

This case involves the Railway Labor Act and parts of the Norris-LaGuardia Act as set out in the petition.

STATEMENT

A. Procedural History

This action was commenced on November 15, 1969 with the issuance of a temporary restraining order which enjoined a strike begun that morning by certain employees of the United Transportation Union (UTU) against the Atlanta & West Point Rail Road (A & WP) and the Western Railway of Alabama (W of A). The temporary restraining order was obeyed by the union, and continued by consent until the issuance, after a hearing on January 5, 1970, of a preliminary injunction which continued to enjoin the strike and directed the parties to follow the bargaining procedures required by the Railway Labor Act.

The injunctive part of the District Court's order read as follows:

> "Accordingly, an injunction will issue against the union until the statutory procedures have been followed and until further order of the court, and both parties shall proceed forthwith to make a good-faith effort to settle in conference their differences with regard to all bargainable proposals for changes which the union served upon plaintiffs in November, 1965."

The union appealed from "that portion of the Order dated January 5, 1970, which preliminarily enjoined the defendants from striking" (App. 150). While that appeal was pending, the Union made an application to the District Court to have the railroad cited for contempt for its alleged refusal to bargain in accord with the remainder of the Order. The application was denied, in an order dated June 29, 1970, a copy of which is attached hereto as Appendix A, the court finding that the railroad had bargained in good faith. Finding that the matter was before the National Mediation Board, the Court expressed doubt of its jurisdiction to rule on the application, apparently out of concern for the exclusive jurisdiction of the Board, but made its ruling for what value it had. That ruling was not appealed.

The Court of Appeals, after a lengthy and extended oral argument which explored every facet of the case, unanimously affirmed the District Court's initial order, holding that the District Court "did not abuse its discretion when it preliminarily enjoined the strike in question."

This petition for certiorari is from that affirmance.

B. Background of the Dispute and Summary of Related Litigation

This is still another case growing out of the conflict between the railroads and the "operating" unions representing some of the railroad employees over the increasingly anachronistic role of the railroad firemen. Between 1956 and 1963, this issue developed with increasing momentum, culminating in a special act of Congress which provided for compulsory arbitration of the future role of the fireman in the railroad industry. That statute, Public Law 88-108, 77 Stat. 132, created an Arbitration Board which made an Award, since known to the parties and many courts as Award 282, which was to be effective as

between all the carriers (including the respondents) and the Brotherhood of Locomotive Firemen and Engineers (BLF & E), a predecessor to the petitioner, United Transportation Union (UTU), until March 30, 1966. Although the railroads paid an extremely high price in the form of termination benefits under the Award, the Award allowed them to eliminate some ninety per cent of the positions for firemen. The firemen themselves were to be separated over a priod of time.

On or about November 15, 1965, the BLF & E served three notices to the railroads under Section 6 of the Railway Labor Act, 45 U.S.C., Section 156 (1964), which, among other things, proposed in substance that upon the termination of Award 282 there would come into effect rules that were substantially similar to the old work rules, with some relatively minor adjustments. At this point, apparently the unions were not sure what rules, if any, would be in effect the day after the Award expired. The carriers similarly were uncertain as to what the situation would be the day after Award 282 expired, and, although preferring to believe that the rules and conditions established under Award 282 would continue after March 30, 1966, "just in case" served counter-proposals on the unions to preserve the benefits the Award had created for them. Some of the railroads (although **not** the respondent railroads) and some of the unions, including the BLF & E, proceeded to litigate these and several other questions in the United States District Court for the District of Columbia. The first question, what rules were in force the day after the Award expired, was decided adversely to the position of the union in the District Court, and the BLF & E appealed that decision. Secondly, the railroads had generally declined to discuss the merits of the BLF & E's notices prior to the termination of the Award, on the ground they had no legal duty to do so. The District Court ruled in favor of the railroads' position, and the

union appealed that likewise. On appeal, the Court of Appeals for the District of Columbia affirmed the District Court in its view that Award 282 created a "new plateau" for bargaining, but ruled that the railroads had had a duty to bargain prior to the termination of Award 282 on March 30, 1966.

This background of facts and litigation is thoroughly and authoritatively described in **Brotherhood of Railroad Trainmen v. Akron & B.R.R.**, 385 F.2d 581 (D.C. Cir. 1967 and 1968), cert. denied, 390 U.S. 923 (hereafter referred to as **Akron**).

While this litigation proceeded on its course; still other litigation was initiated between the BLF & E, the Brotherhood of Locomotive Engineers (BLE), the National Mediation Board (NMB), and some of the other carriers (but **not** the respondents here), attempting to determine whether the BLF & E or the BLE had an exclusive right to contractually arrange an apprentice engineer program with the carriers, and consequently to represent those apprentices. That case was finally decided on April 29, 1969, after which the carriers who were parties to that litigation, feeling that the ruling put them in what the court described as the "unhappy position of having to deal simultaneously with two rival unions whose bargaining demands will very likely conflict . . ." applied for certiorari. Certiorari was denied on October 20, 1969. See **Brotherhood of Locomotive Firemen & Enginemen v. National Mediation Board**, 410 F.2d 1025 (D.C. Cir. 1969) cert. denied, 396 U.S. 878 (hereafter referred to as BLF & E v. NMB).

C. **Facts Leading Up to the Injunction**

The present parties' conduct generally adhered to the patterns described above. The BLF & E served the same three notices upon respondents on November 15, 1965, to

which they responded with a counter-proposal, following which there were some desultory contacts between the parties over whether or not the notices presented issues that were bargainable at that time (App. 348-50). At one point in early 1966, the railroads were willing to begin negotiations if all the notices (both the union's proposals and the railroad's counter-proposals) would be considered together, but the union rejected this offer and stated that conferences on the **union's** proposals had been terminated sometime prior to that date and "could not" be reopened (App. 321-27, 403-06). Although there were some sporadic subsequent suggestions of the union's willingness to cooperate in training apprentice engineers (App. 294), which was also the general subject of the third notice filed by the appellant union on November 15, 1965 (App. 116-18), none of the parties apparently made any serious attempt to reopen negotiations on the question (App. 295, 326-27). The record strongly suggests that the matter rested in that state, not because of a lack of interest or a stubborn refusal to negotiate on the part of any of the parties, but rather because in fact everybody concerned was interested in the outcome of the litigation described above. Obviously, all the parties realized the outcome of that litigation would affect them and hence nothing productive could be done.

Shortly after the denial of certiorari in BLF & E v. NMB, on November 7, 1969, the National Railway Labor Conference (NLRC), the representative of the respondents and the other carriers, made a written offer to the UTU to commence negotiations on the apprentice training program and suggested a time and place for that meeting (App. 49-50). The International President of the UTU in Cleveland, Ohio, in a letter dated November 12, 1969, the day before the meeting date proposed by the NLRC, replied to the effect that the UTU was not prepared to handle the matter on a national basis, and stated that the "sugges-

tion for a meeting should be sent to the General Chairman of those General Committees which sent that Notice" (App. 47-48).

Sometime on November 14, 1969, the International Vice President of the UTU arrived in Montgomery, Alabama, from Cleveland, Ohio (App. 360). Early in the morning of November 15, the Vice President for the first time told the General Chairman of the UTU on the A & WP and the W of A that a strike was set on those railroads for 6:00 A.M. that very morning (App. 360-62).

At 6:00 A.M., the strike commenced (App. 254); that evening (November 15, 1969) a temporary restraining order was issued by the U. S. District Court for the Northern District of Georgia, which was continued by consent, until, after further hearings, the Court issued a preliminary injunction, part of which is appealed in this proceeding. That injunction also ordered (and this part was not appealed) the parties to make "a good-faith effort to settle in conference their differences with regard to all bargainable proposals for changes which the union served upon plaintiffs in November 1965."

D. **Facts Arising Subsequent to the Injunction**

As noted previously, shortly thereafter, negotiations were begun between the parties in conference on the subject of an apprentice training program, which negotiations, upon reaching an impasse on one point, were removed by respondents to the National Mediation Board in early February, 1970.[1]

The NMB docketed the dispute, and assigned a mediator to it who held at least two sessions on the matter. Subse-

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[1] The facts occurring subsequent to January 5, 1969, are recited in the court's order of June 29, 1970 on the contempt application.

quent to this, and prior to the docketing of the petition for certiorari, the parties reached an agreement on an apprentice training program on these two railroads, which agreement was executed on May 7, 1971.[2]

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[2] To complete the major outline of the factual record, although it is not critical to the case, the National Railway Labor Conference on November 19, 1969, on behalf of its member railroads, which include the respondents, requested mediation by the NMB on the dispute growing out of the union's Notice No. 3 (App. 18-50). In response to a request for their views on the matter, the UTU's International President on December 2, 1969, opposed national handling of the dispute and asked that the application filed by the carriers for mediation be dismissed (App. 50-58). As of this date, no action has ensued at the national level, although counsel understands some railroads and local committees have reached local agreements, as have the parties to this action. The court's order of January 5, 1970, in effect, of course, resolved, at least as to these parties (and only as to them), any questions as to whether the negotiations would be handled locally or nationally, although this is not in dispute here.

ARGUMENT

The petition for certiorari should be denied for the following reasons:

a) The issue on appeal is the propriety of a preliminary injunction barring a strike. The dispute over which the strike began has been settled, and the dispute is moot.

b) The injunction was for a limited duration and has already expired by its own terms.

c) What has been appealed is a preliminary injunction, in which the District Court has wide discretion to operate upon the facts then at hand. The Fifth Circuit Court of Appeals unanimously affirmed the District Court order upon precisely that ground.

d) Most of the issues presented as "questions" by petitioners are essentially fact issues (Petitioners' Questions I, II, IV and V).

e) The remaining issue is whether the District Court properly balanced the Norris-LaGuardia Act against the Railway Labor Act, based upon all the evidence before the Court. This, too, is essentially an evidentiary question, with broad latitude to the trier of facts.

f) Apart from being meaningless to the parties, there are no issues of national significance in this particular issue.

Mootness

To properly appreciate the mootness of this entire dispute, repetition of certain critical facts may be in order.

Subsequent to the affirmance of the District Court's Order by the U.S. Court of Appeals of the Fifth Circuit and after the filing by the Union of its notice that it was

filing a petition for writ of certiorari (but before the petition was actually filed), and in spite of the fact that the dispute between the parties was still lodged before the National Mediation Board, representatives of the Union and the Carrier (acting as concerned business men, without the help of lawyers and professional mediators) met once again at the conference table and resolved their dispute by entering into a contract providing for an apprentice training program for the employees represented by the Union. A copy of this contract is attached as Appendix B.

The issue is moot for several reasons, but the first and most compelling reason is the simple fact that the entire controversy has its origin in the claimed failure of the Railroad to negotiate such a contract. Whatever the collateral issues may have been in the District Court, they arose solely by virtue of the alleged failure of the Railroad to negotiate in good faith with the Union toward the making of a contract. Whether in the first instance, the Union was at fault, or the Carrier was at fault, or whether the Carrier was entitled to relief, making these judgments now becomes an academic exercise for the reason that the fault, if there be any on either side, has been erased by the entry of the parties into the contract covering the subject matter of this litigation. Thus, not only did the parties get on the track prescribed by the Railway Labor Act, as directed by the District Court, they stayed on the track and reached the terminal at the end, and the contract envisaged by the Act (and we might add, undoubtedly contemplated by the District Court in its wisdom) has resulted and there is no longer any dispute between the parties. There is no basis for the Union to now strike on any of the grounds which formed the initial basis of this dispute and which were appealed and whether this Court affirms or disaffirms the Court below cannot make the least practicable difference to either party. Should

this Court reverse this decision, that would not undo the contract which has been signed. What is before the Court is, as a practical matter, merely a lawyer's technical debate about whether the Courts below used the proper reasoning in making the parties adhere to the Railway Labor Act. If there is any real concern of the parties about this matter (other than the concern of their counsel to be vindicated) it can only be to acquire ammunition for some future round in the eternal railroad-union story of marital discord on some other issue. It is difficult to imagine a more classic case of a moot proceeding. On such a basis, clearly a writ of Certiorari should not be granted. See **Oil, Chemical & Atomic Workers In'tl Union v. Missouri**, 361 U.S. 363, 4 L.Ed.2d 373, 80 S.Ct. 391 (1960).

The second major reason why this proceeding is moot lies in the wording and nature of the injunction itself. At the risk of being repetitious, it should be stated again in full:

> "Accordingly, an injunction will issue against the Union until the statutory procedures have been followed and further order of the Court, and both parties shall proceed forthwith to make a good-faith effort to settle in conference their differences with regard to all bargainable proposals for changes which the Union served upon plaintiffs in November, 1965."[3]

It should be noted that there is a definite time limit to the injunction, namely "until the statutory procedures have been followed". Before discussing the only logical interpretation of that phrase, we should briefly review the bargaining procedure under the Railway Labor Act. The

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[3] It should be noted that although the injunction is not particularly precise as to what acts it barred (apart from the question of duration), all the parties at all stages below have clearly understood and proceeded on the assumption that it does bar a strike by the union over the issue in dispute.

first step is that "All disputes between a Carrier of Carriers and its or their employees shall be considered, and, if possible, decided with all expedition, **in conference**, between representatives . . ." Section 142, Second, of the Railway Labor Act, 45 U.S.C., Section 152, Second (emphasis added). If the "in conference" discussions are unsuccessful, then either party may move the negotiations to either the National Railroad Adjustment Board or the National Mediation Board and if to the latter, then possibly on to first, arbitration, and finally, to a Presidential Emergency Board, if one should be appointed (45 U.S.C., Sections 153, 154, 157 and 160).

Thus, it is clear that the words "in conference" are words of art in the Railway Labor Act. It is equally clear that the two-party phase of the negotiations has been concluded. As a matter of fact, this occurred before June 29, 1970, as shown by a subsequent Order of the District Court which was a result of an effort by the Union to have the Carrier cited for contempt for failing to negotiate while the case was pending appeal in the Fifth Circuit. In the Court's Order (Appendix A), the Court expressed

> ". . . extreme doubt whether it has any jurisdiction, at this stage, to go back to an antecedent stage of the proceedings [the 'in conference' stage] and consider whether or not there had been negotiations or whether such negotiations were conducted in good faith . . . The parties being still in the process of going through these stages, the Court declines at this time to usurp the functions of the Mediation Board by going back and making evidentiary findings about antecedent negotiations."

Thus, if the District Court was dubious of its jurisdiction to enforce its injunction beyond the "in conference" stage of negotiations, it must have certainly had consid-

erable doubt whether the injunction in fact existed at that time. And clearly, if the Court had doubt as to the continued vitality of an injunction, it can hardly have been an injunction which, in fact, restricted the Union from striking, for it is the essence of an injunction that before one can be penalized for violating it, there must have been a clear notice to the alleged violator that the conduct complained of was prohibited at the time the alleged violation occurred. Any doubt, of course, as to whether or not the injunction has expired would have to be resolved in favor of a limiting construction. See **Terminal Railroad Ass'n v. United States**, 266 U.S. 17, 69 L.Ed. 150, 45 S.Ct. 5 (1924). If the strike injunction did not exist in fact or law on June 29, 1970, it clearly cannot exist now. That the prohibition against striking was to last only as long as the compulsory injunction to negotiate is the only reasonable interpretation that can be placed upon the Trial Court's final sentence.

This precise argument was raised below in a Motion to Dismiss the Appeal made to the United States Court of Appeals for the Fifth Circuit, but that Court did not expressly rule on the Motion to Dismiss, although it consumed by far the major part of the oral argument before that Court.

Similarly, a second argument in the Court of Appeals as to mootness was made on the ground that since the National Mediation Board had assumed jurisdiction of the dispute, as was shown conclusively by the District Court Order of June 29, 1970, the Union could not lawfully strike in any event even if the injunction were dissolved. It is an elementary proposition that so long as the National Mediation Board has jurisdiction of a dispute, neither party may unilaterally withdraw from negotiations and lawfully strike. Thus, even if the injunction had been dissolved below or were to be dissolved by this Court,

that fact would not allow the Union to strike so long as the matter was before the National Mediation Board.

An alternative, and equally compelling ground for showing the mootness of the present dispute before this Court, is that having in both the District Court and the Court of Appeals taken the position that the injunction had on its face already expired, the Carrier would be estopped from seeking to enforce the injunction should the Union proceed to strike in defiance of it. Thus, there is no threat of enforcement, and the Union cannot legitimately claim that the existence of this injunction endangers it, for it now exists apparently only because of the reluctance of the Union to lose its foundation for this appeal. The District Court continued the injunction only until "further order" of that Court, which further order the Union can have for the asking.

It might be suggested that even if the settlement of the underlying dispute has made the existence of the no-strike injunction a moot issue, petitioner has a remaining question which is not moot. This is the alleged question concerning the correctness of the trial court's "holding" that the BLE contract does not infringe on the conditions of the firemen's service.

Petitioners' Second Question, discussed at page 26 of the Petition for Writ of Certiorari, states that this question is really only "a separate and independent justification for the strike and a separate reason that the injunction was unlawful". While Petitioner in the Court below prayed "That the plaintiffs be temporarily and permanently enjoined from continuing in force or implementing in any way the July 26, 1969 agreement with the Brotherhood of Locomotive Engineers, or any program under it" (App. 65), the Court's failure to grant the relief requested was specifically not appealed by Petitioner from the Trial Court. The appeal to the United

States Court of Appeals for the Fifth Circuit was only from "That portion of the Order dated January 5, 1970, which preliminarily enjoined the defendants from striking" (App. 150). The alleged finding contested in Appellant's Question No. II, in addition was only one of fact found to the extent necessary to support the preliminary injunction which was appealed. Whether it did or did not justify the injunction becomes irrelevant if the injunction itself has been dissolved by the corrosion of time into a nullity. Hence the "Second Question" is not an independent question for review, but is moot, as are the four other questions initially posed by petitioners.

Summary of Argument on Mootness

This is an appeal from the grant of a preliminary injunction. It was unanimously affirmed by the Fifth Circuit. On its face it has already expired when compared to subsequent events. As a matter of law it has expired. As a matter of fact, it enjoins a strike over a dispute that has been completely and voluntarily terminated by the parties to the dispute and this action. Whether this Court affirms or reverses the Court below cannot be of the least practical difference to either party, as it will not revive their initial dispute. There is not a particle of difference between the case at hand and McLeod v. General Electric Co., 385 U.S. 533, 17 L. Ed. 2d 588, 875 S. Ct. 637 (1969), where after the parties agreed upon a new labor contract, this Court held that it would not be appropriate subsequent to that event to determine the proper construction of the National Labor Relations Act which one of the parties had allegedly violated by refusing to bargain. The petition should be denied in order that the parties may apply for the proper procedural remedy in the District Court to have this case finally terminated.

Certiorari Should Not Be Granted on a Preliminary Injunction Absent a Clear Error

As has been mentioned, none of the four judges who have considered this case have yet found the errors complained of by petitioners. This was a preliminary injunction, where the judgment of the trial court is traditionally given the widest latitude.

Let us review the alleged errors of law made unanimously by the four judges who have considered this case heretofore in the order of the "Questions Presented" by the petitioner.

Question Number I.

"Whether the Court below erred in holding that a union should be enjoined from striking because of a failure to have meaningful Railway Labor Act negotiations where the failure to have such negotiations is attributable solely to the carrier's actions to frustrate negotiations."

The most obvious feature of this question is that it is purely a fact question. There was evidence on both sides as to why there had not been negotiations. But the record was clear that the last communication known to have been received by either party was a letter sent by the National Railway Labor Conference on November 7, 1969, which offered a date and place to meet to discuss Notice No. 3. Whatever may have happened prior to November 7, 1969, and whether or not respondents did or did not make every effort to settle the dispute prior to that date, the fact remains that on November 7, 1969, the railroad's bargaining agent had made an offer to sit down and negotiate. For the petitioner to prevail on this theory, he must change the Norris-LaGuardia Act to make it read:

> "no restraining order or injunctive relief shall [ever] be granted to any complainant who has [ever] failed

> to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has [ever] failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

In short, instead of the common sense approach of "who washed last" of the Norris-LaGuardia Act, petitioner proposes to make the Norris-LaGuardia Act into an absolute "clean hands" test—if the party seeking the injunction **ever** failed to do something in the past, regardless of his recent efforts, he cannot enjoin a strike and the parties are left to fight it out by the law of the jungle. Such a reversion may be petitioner's true aim, but it is hardly consistent with the measured processes of the Railway Labor Act, or indeed consistent with the reasons why we even have a Railway Labor Act.

There is only one contention in petitioner's first question that has any real merit to it. On page 15 of the petition it is noted that "The District Court did not find the carrier had perfected its right to equitable relief." It may be, that under a strict interpretation of Rule 52 of the Federal Rules of Civil Procedure, the District Court should have made the express finding which the evidence would have warranted: That the carrier was willing to negotiate on November 7, 1969, and thereafter until the moment of the strike, and thus had perfected its right to equitable relief. But a failure to make every finding of fact is not normally the basis for seeking a reversal of the grant of a preliminary injunction. On a preliminary injunction, the question is usually one of finding where the merits appear more likely to fall upon the final trial of the case, and it is not necessary to find every fact that would support a permanent injunction with finality on a mere hearing for a preliminary injunction. This is particularly so when

that fact is highly disputed itself and there is conflicting evidence, as there was on the matter at hand. It may well be, although there is no evidence on the record to support this, we may say candidly, that the District Court deliberately did not put down its finding in its order for the very practical reason that to have made such a finding when the parties had concededly not even begun to negotiate, would hardly be conducive to creating a climate in which negotiations would be productive.

Perhaps it is difficult to completely grasp the situation which existed at the time the Court issued its preliminary injunction, but some of the comments from the Court in that proceeding are certainly illustrative of the objective the Court was trying to reach:

> "The Court: Well I think there must be something in the law that permits the Court to do something intelligent once in a while.
>
> Mr. Gibert: We don't think enjoining our strike is certainly what it is. The law provides that they can negotiate.
>
> The Court: Looks like somebody's going to have to handcuff both of you and sit you down at the table.
>
> Mr. Gibert: Well I'll be happy to sit down, your Honor, but not while there is an injunction and not while they've got this other deal in effect.
>
> The Court: This reminds me of a divorce case" (App. 196).

Clearly the Court was concerned with cutting through the animosities that had built up over the years over this issue and in getting the parties to the negotiating table. What purpose then would a finding that one party or the other had been at fault in 1965 or 1966 or 1967 have served? If the railroad had perfected its right to equitable relief on November 7, 1969, by offering to negotiate, that was all that was important.

Attempting to assess blame for ancient history would not have accomplished a single thing, and probably would have been detrimental to the broader objective the Court was trying to reach. As noted previously that objective has been reached—a contract has been signed and the dispute terminated. Therein lies the evidence that the course adopted by the District Court in deliberately not making the specific finding was the correct one.

Question Number II

"Whether the Court below erred in holding that the agreement between the Carrier and another union (Brotherhood of Locomotive Engineers), and its implementation, did not constitute a change in the terms and conditions of employment of the appellants' firemen, where the agreement, and its implementation, had an adverse effect upon the firemen's seniority and "historical expectation of promotion to the job of engineer."

This is purely a question of the construction of the BLE-Carrier contract. It should be noted that in this case there has been no National Railroad Arbitration Board finding as to what that contract does or does not mean and whether or not it does or does not represent a breach of the existing firemen's contract. If it was, it could only be at the most a minor dispute. But clearly the District Court's determination, for purposes of issuing an injunction only, of what that contract does or does not mean is hardly a matter for review by this Court. Certainly would this be the case on the very minimum record we have here as to the conditions of employment of the respondent's firemen and the extent, if any, to which the BLE-Carrier contract interfered with the firemen's expectations.

If it is correct to make the Court's failure to find a particular fact a basis for reversal in this case, then the

same might be noted with regard to this question. The District Court made no finding that the firemen on **this** railroad had any particular "historical expectations of promotion to the job of engineer." Petitioner does not tell us where that quote originates, but the words appear not in the record in this case, but from the decision in **BLF & E v. NMB**, 410 F.2d 1025, at 1032. Petitioner cannot warp facts from different cases between different parties into this case by the mere assertion that they are so. This is a relatively small railroad and what the expectations, if any, of its firemen were, and what the alternative sources of engineers were for this railroad in the historical past has hardly been touched on the record so far.

In any event, interpreting a contract (in this case the BLE contract) is exclusively a function of the National Railroad Adjustment Board. **Order of Railway Conductors v. Pitney**, 326 U.S. 561, 90 L.Ed. 318, 66 S.Ct. 322 (1946). To claim as a ground of appeal that the District Court did not interpret the BLE contract correctly is to proceed on the premise that it is the function of the District Court to interpret railway labor contracts. The premise being incorrect, the conclusion must be likewise faulty.

Question Number III

"Whether the Court below erred in holding that the Union should be enjoined from striking because of the failure to have Railway Labor Act negotiations where the Carrier instituted unilateral changes in working conditions (directly related to the subject matter of the Union's Section 6 Notice), while refusing to negotiate with the Union."

Here again, we have nothing but a disputed fact question, which the Court failed to find as the union contended, namely that the railroad had changed the working condi-

tions of the firemen. Here again, there was substantial evidence on both sides, although we prefer to believe that the majority of the evidence was on the side of the railroad. In any event, these contentions again involve interpretations of both the firemen's contract, and the engineers' contract, and there is certainly a very minimum record other than the face of the contract to support these contentions. The Fifth Circuit unanimously found that the District Court had not made a clearly erroneous finding on the issue, after this same ground had been urged upon it, and there would seem to be little reason why the petitioner should expect this Court to reach a different result.

Question Number IV

"Whether in issuing the preliminary injunction against the strike the District Court failed to give proper force and effect to Section 8 of the Norris-LaGuardia Act, and whether in affirming the Order of the District Court the Court of Appeals similarly erred?"

Again, the petitioner proceeds upon the assumption that the Norris-LaGuardia Act says something it doesn't say, namely that which is set out above. There is no bona fide dispute here between the courts or the parties on the relationship of the Norris-LaGuardia Act to the Railway Labor Act. The District Court injunction was clearly issued to carry out the Railway Labor Act. The evidence was clear before it, and all the parties conceded, that no negotiations had taken place, but both parties contended that they wanted to negotiate. The only flaw was that both wanted pre-conditions to negotiations which were not acceptable to the other. The Court cut through all the conditions, and ordered the parties to negotiate in accord with the Railway Labor Act. Having ordered them to negotiate, the Railway Labor Act itself forbids the parties to change the status quo or to strike. Thus, having

had their feet firmly set along the negotiating track laid down by the Railway Labor Act, the Union was barred from striking, not only by the injunction, but by the Railway Labor Act itself. Once negotiations had started, the Railway Labor Act itself would have been sufficient to prevent the union from unilaterally withdrawing from negotiations and beginning an illegal strike. If it is feasible to reconcile Norris-LaGuardia and the Railway Labor Act by forbidding a strike until the negotiating track has been followed to the end, why is it not proper for a court to order the parties to negotiate and in the same breath and as part of the same order, order a union not to strike until it has exhausted the negotiation route described by the Railway Labor Act. Indeed, having mandatorily ordered the parties to negotiate under the Railway Labor Act, the injunction became pure surplusage. Undoubtedly it was issued because of the union's expressed desire to have a strike on while they negotiated, but technically, if the Court had been able to assume that the parties would comply with the Railway Labor Act, there would have been no need to even issue the injunction against the strike. Thus, to argue that the Court did not properly apply the Norris-LaGuardia Act is to show a total lack of comprehension of what the Railway Labor Act says to begin with.

Question Number V

"Whether the District Court injunction and the Court of Appeals' affirmance constituted error where the Carrier's simultaneous (a) negotiation of an agreement with the Brotherhood of Locomotive Engineers, and (b) refusal to negotiate with Appellant, on a matter in which both unions had an interest, were for the purpose, and had the effect, of influencing the employees in their choice of representative in violation of Section 2 of the Railway Labor Act?"

Petitioner's fifth question, which is spelled out with more clarity on page 31 of the Petition, "The real purpose of the carrier is to destroy the UTU . . . ." is clearly only a make-weight. There was not a shred of evidence advanced by the union at the hearing to support this contention. The only evidence that was offered, in fact, was that of the Personnel Director of the carrier. The following interchange took place while on cross-examination:

> "Mr. Gibert: [for the union] And you said you would have been willing to negotiate if anybody had just wanted to negotiate, right? Is that what you said about Notice No. 3?
> A. Yes, sir. I would negotiate with the BLF & E just as quickly as we would with the BLE. I have no choice as to unions, Mr. Gibert. As a matter of fact, one is just as troublesome as the other, to me personally" (App. 339-40).

This must be one of the classic comments in the history of labor management court cases, but it is the only evidence on the record as to whether the railroad management preferred one union to the other. It certainly does not support the position taken by petitioner here.

Since it has been ruled in **BLF & E v. NMB**, supra, that carriers have an obligation to bargain with both unions over apprentice engineer training programs, it would seem axiomatic that it may be possible to reach an agreement with one ahead of the other. How then can the making of an agreement with one union be considered as a matter of law, rather than a mere allegation, to be a preference of a chosen union.

Indeed, petitioner has not always been entirely consistent in its view on the BLE-carrier contract. The Union has previously argued that the BLE contract is not even a contract. Witness the following observation:

> "Mr. Gibert: In the first place, I disagree with my brother here in that they are not contractually bound in that the agreement with the Brotherhood of Locomotive Engineers lets them do anything they want to, which includes suspending the program if they want to" (App. 179-80).

How then can it be an act of favoritism to make a non-contract, a nullity, with another union?

There Is No National Issue in This Case

All of petitioner's questions and points of argument in this case must essentially come down to the question of whether this Court should consider this case at this time. All that is on appeal is a preliminary injunction, which has already completely run its course so far as these particular parties are concerned. However, even though a case might be moot in fact as to the parties before the Court, it is recognized that the Court might well wish to consider the case if it involved a matter of significance to more than these parties. This is not such a case.

The evidence is undisputed that this railroad in fact followed the pattern followed by the other railroads in dealing with the BLF & E/UTU Notice No. 3, served on November 15, 1965. That is to say, they initially took the position that it was premature, unbargainable, and inappropriate to negotiate it inasmuch as the same matter was in litigation with the BLE. And like most of the other railroads, respondents more or less let the matter lie on the back burner while **Akron** and **BLF & E v. NMB** proceeded on their leisurely way. Then, when all the litigation had terminated, and everyone was aware of what each party's rights and obligations were, the railroads made a good faith effort to open negotiations. So far, again, the picture is common among almost all of the nation's railroads. At that point, this railroad was met with a strike,

which was met in turn with a temporary restraining order and finally this preliminary injunction. Had not the other railroads and the union committees on the other railroads moved on independently of this strike, conceivably this case might now have some significance to parties other than those before the Court. However, events have not stood still. On November 19, 1969, the National Railway Labor Conference, on behalf of almost all the railroads, including respondents, on a national basis requested the services of the National Mediation Board (App. 18-50). The union initially opposed national mediation on this matter (App. 50-58), and the matter has not been docketed or accepted for handling by the Board. However, a number of other railroads have, like respondents, worked out local agreements pending a possible national settlement of this issue. Thus, it is clear that in one way or another all the other railroads have moved this matter on and hence the status quo that existed on November 15, 1969, on this railroad is no longer applicable anywhere else.

Not only is this the case, but quite apart from events subsequent to November 15, 1969, events prior to that date were testified to which were peculiar to this railroad and this railroad only. Critical among these was a letter sent from the general grievance committee of the BLF & E for respondents and respondents only on February 22, 1966, which states in relevant part:

> "Your letter of February 14, 1966, suggests that we meet for a discussion of this matter, and we wish to point out that our three (3) separate proposals have already been a subject of conferences on the property and these conferences have been terminated. I cannot permit these conferences to be reopened, and hence our meeting must be limited to discussion of the carrier's notice alone" (App. 405-06).

This letter was sent to respondents, and concerns the Notice No. 3 over which this strike was allegedly commenced. Although there was a great deal of testimony in an effort to explain away this letter, certainly the words seem to have some ordinary significance, and the Court obviously had substantial grounds for not finding that it was solely due to the railroad's fault that no negotiations had been had on the union's Notice No. 3. Not only this letter, but other alleged conversations between railroad and union officials pertaining to Notice No. 3 would have been peculiar only to this railroad and this general committee, and have no relationship or bearing on what might have taken place on other railroads at different times.[4]

In summary, this matter is of no real concern to either the national union or the other railroads of the nation, and since it is no longer even of any great concern to the parties involved, there really seems to be very little reason for this Court to be concerned about it either.

There Is No Conflict With Previous Decisions of This Court or With Other Circuits

Petitioner contends in passing that the decision below conflicts with the decision of this Court in **Brotherhood of Railroad Trainmen v. Toledo, Peoria and W.R.R. v. United**

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[4] This is also the view of the union in this case as shown in the following interchange:

"The Court: Are you willing to negotiate in this national arena?

Mr. Gilbert: No. sir.

The Court: Why not?

Mr. Gilbert: The AWP is not like the others. The other railroads did not start an apprentice. Only the A&WP and the L&N. And the other hundred railroads which are represented by the Railway Labor Conference have got different issues . . . But the L & N had got an apprenticeship program with the BLF&E, and we had got—and the A&WP had an apprenticeship program with the BLE, and all the others are different." (App. 206-07)

Transportation Union, 321 U.S. 50, 88 L.Ed. 534, 64 S.Ct. 413 (1944). There is no conflict with the Toledo case presented here. In Toledo, the negotiations had gone through mediation and the carrier had declined to submit to voluntary arbitration. A strike ensued, accompanied by violence. It should be carefully noted that the strike itself was perfectly lawful under the circumstances, while, of course, the accompanying violence was not. But in the very heart of the opinion in Toledo is found the following comment:

> "Arbitration under the Railway Labor Act was available, affords the method of settlement Congress itself has provided, and **until** respondent accepted this method it had not made 'every reasonable effort to settle' the dispute, as Section 8 requires." 321 U.S. at 65. (Emphasis added.)

Clearly this Court itself in Toledo foresaw that it would not be necessary to examine every action of the past decade to determine whether a plaintiff in court had the clean hands necessary under Norris-LaGuardia. It was only the state of grace at the moment relief was sought which mattered. Reasonably, this is the only way in which the major objectives to the Railway Labor Act can be reached. Certainly over the years, virtually all the railroads and unions generally have taken some preliminary positions that have ultimately not been sustained in Court. There is always at least one loser in such litigation. To rule that the victorious side may immediately always proceed to self-help and do away with the Railway Labor Act, if it believes that self-help will be more effective than negotiations in convincing the losing party to yield, is to invite open warfare and the law of the jungle in an industry which Congress has recognized is specially vested with a public interest.

Indeed, any remaining doubt as to the duty resting upon both parties to negotiate in spite of past conduct

has now been settled by the very recent decision of this Court in **Chicago & N. W. Ry. Co. v. United Transportation Union**, decided on June 1, 1971, Supreme Court Docket No. 189 (unpublished), wherein this Court declared the obligation of the parties to negotiate to be a continuing one, not only throughout the processes of the Railway Labor Act, but continuing in fact even after the formal processes of the Act have been completed and the parties are otherwise free to exercise self-help.

So far as the case of **The Detroit and Toledo Shore Line R. R. v. U.T.U.**, 396 U.S. 142, 24 L.Ed.2d 325, 90 S.Ct. 294 (1960), is concerned, its relevance in this dispute is only to support the railroad's position. Absent a showing that the railroad had somehow changed the objective conditions under which the firemen were working, which has not been shown to any of the four judges who have looked at this case so far, all that Shore Line says is that the parties must retain the status quo while negotiations are going on. This would include as part of the status quo that existing labor contracts must be honored, and strikes may not be commenced. Thus, once negotiations had begun, as ordered by the Court, Shore Line teaches that the injunction became in fact superfluous, as the union was not then free to strike in any event. (Of course, it could have struck in fact, although such a strike would have been unlawful, but such a strike could have been properly enjoined upon the grounds of its then unlawfulness.)

Nor is there any significant conflict among the circuits here. Petitioner asserts in its introduction that there is one, but careful reading of the petition fails to support this. To be sure, in **Rutland Ry. v. Brotherhood of Locomotive Engineers**, 307 F.2d 21 (2nd Cir. 1962), the Court there held that before issuing an injunction the District Court should have made a finding of fact that the railroad had gone the last mile in seeking to negotiate the matter. That sounds as if it is in conflict with the decision in this

case, but when the District Court opinion is read, at 188 F. Supp. 721 (D.Vt. 1960), it readily appears that this was in fact a permanent injunction which was issued. In that case, of course, a finding properly should have been made in accord with Rule 52 of the Federal Rules of Civil Procedure. This is only a preliminary injunction and so there is no real conflict here. The majority in Rutland also noted (307 F.2d at 41), that "We cannot determine from the record alone, without the benefit of observing the witnesses, whether the extent of these discussions met the standard we find is imposed by the Railway Labor Act." Here, of course, the critical question is the effect of the letter of the National Railway Labor Act." Here, of course, the critical question is the effect of the letter of the National Railway Labor Conference of November 7, 1969, upon which there were no witnesses, and the Court of Appeals could read the letter as well as the District Court. Thus, there was no need to have an evidentiary hearing on remand, even if the Fifth Circuit Court of Appeals had adopted the view apparently urged by petitioner that a finding of fact should have been made even on a preliminary injunction. This being the case, the facts were as fully before the Court of Appeals as they were the trial court, and there was no error affirming the District Court opinion. In any event, in quoting in part from a dissenting opinion in Rutland, the trial court undoubtedly considered the intrinsic merit of the opinions most carefully and with due respect for the authors.

CONCLUSION

The issue which is on appeal is whether the Court erred in enjoining a strike by issuing a preliminary injunction. Petitioners assert in the Conclusion of their petition that

> "The history of this dispute shows that there will never be negotiations with respect to Notice No. 3 until the union is free to resort to self-help. As soon as a non-enjoinable strike takes place, the parties will negotiate an agreement, not before. When that happens, some measure of peace may come to the industry."

In other words, the union's position, at least before this Court, is that the only way the railroad will ever bargain on this question is for the union to be free to strike and do anything else which may occur to the members or leaders. Unhappily, the facts stand in sharp contrast to the assertion. Indeed, they show that as a practical matter, if the Court were to reverse the decision below, it would not now make any practical difference to either party.

While this may sound strange coming from the prevailing party below, which did obtain the injunction it sought, any other statement would be false. The railroad and the union have reached an agreement over exactly the Notice No. 3 which was the *cassus belli* of this dispute. This agreement was signed on May 7, 1971, and is the culmination of negotiations that have been going on ever since this injunction was granted.

Thus, all that is left for this Court to decide is the rather sterile question of whether the District Court was correct in enjoining the strike and in ordering negotiations to proceed back in 1969. Should this Court decide the Court below was in error at that time, it certainly would not undo this contract, nor could such a decision stand as anything more than an essay on Railway Labor Law, utterly devoid of any practical effect so far as these parties are concerned. Such a case does not seem to be one upon which this court should exercise its discretion and grant certiorari.

Four judges have considered this matter, fully and exhaustively. None have found merit in these same arguments. There is no national issue here, no conflict among the Circuits; no variance among the Circuits. What can possibly result from stirring the case again? Let certiorari be denied and the injunction can be dissolved by the District Court, its purpose in life completed.

Respectfully submitted

LAMAR W. SIZEMORE

WILLIAM H. MAJOR

RALPH G. McCALLUM, JR.
310 Fulton Federal Building
Atlanta, Georgia 30303
Attorneys for Respondents

APPENDIX A

United States District Court
Northern District of Georgia
Atlanta Division

Atlanta and West Point Railroad Company and Western Railway of Alabama vs. United Transportation Union, an unincorporated Labor Union; and C. M. Cagle, 1999 Meador Avenue, S.E., Atlanta, Georgia, Individually and as Representative of such class	Civil Action No. 13269

ORDER

(Filed June 30, 1970)

By previous order in this case the court directed the parties to proceed with negotiations pursuant to the Railway Labor Act and the union was enjoined from striking until the provisions of the Railway Labor Act have been complied with.

Thereafter, negotiations were undertaken, they continued for parts of four days (some 17 hours) at which time all differences between the union and the carrier were resolved except one: the duration of the period of apprenticeship. The union insisted that the apprenticeship, for inexperienced railroad men, should continue for a period of not less than one year. The railroad, on the

other hand, held out for an indeterminate period depending upon the candidate's ability to master the job. The parties being unable to resolve this issue, negotiations were called off and the carrier invoked mediation pursuant to the Act.

At least two meetings were held before the mediator, after which mediation was adjourned, and nothing else has transpired, for what reason neither party seems to know.

With the proceeding in this posture the union has come back before the court with a charge (1) that the railroad refused to negotiate, (2) that it was determined not to reach any agreement when negotiations started, and (3) that the negotiations by the carrier were conducted in bad faith. They ask that the carrier be cited for contempt for failing to comply with the order of the court directing negotiations, that the carrier be punished for contempt and that the union be relieved of the anti-strike injunction.

It is undisputed that for whatever reason the controversy is now lodged before the Mediation Board, and the court expresses extreme doubt whether it has any jurisdiction, at this stage, to go back to an antecedent stage of the proceedings and consider whether or not there had been negotiations or whether such negotiations were conducted in good faith. Apparently the Mediation Board thought there had been good faith negotiations or it would not have taken jurisdiction. As the court construed the Railway Labor Act, once proceedings thereunder are commenced they must be carried through all of the stages as the Act requires, whereupon, if the parties are unable to reach an agreement each may resort to self-help. The parties being still in the process of going through these stages, the court declines at this time to usurp the func-

tions of the Mediation Board by going back and making evidentiary findings about antecedent negotiations.

The court is aware that it may be in error in the decision just reached, and in order that there will be no unnecessary delay if this should prove to be the case, the court has heard evidence and arguments of counsel about the conduct of the negotiations and makes the following findings:

(1) That the plaintiff carrier did not refuse to negotiate in violation of the court's previous order;

(2) That the negotiations carried on were carried on by the carrier in good faith; and

(3) That the plaintiff carrier is not in contempt of this court.

For all of these reasons defendant's motion is DENIED.

IT IS SO ORDERED.

This 29 day of June, 1970.

/s/ NEWELL EDENFIELD
NEWELL EDENFIELD
United States District Judge

APPENDIX B

Memo Agreement
Between
Atlanta and West Point Rail Road Company
The Western Railway of Alabama
and
United Transportation Union (E)

As a means of establishing an accelerated program for the training and qualifying of locomotive firemen-helpers to become locomotive engineers, it is agreed:

1. Fireman-trainee will be given a temporary seniority date as fireman (helper) on the date training begins and will receive training in seniority order.

2. (a) Candidates employed by the Carrier for this program will be over 21 years of age and have a minimum of a high school education. Upon passing the entry requirements, the candidate will be given a temporary date as fireman on the date training begins. Should such fireman fail to complete the initial training, or satisfactorily progress in this program, within sixty (60) days, his name will be dropped from the list; otherwise, his seniority date becomes permanent and he will relinquish seniority he may hold in other crafts.

   (b) A fireman-trainee who fails the first examination for promotion will be given a second opportunity following an additional thirty (30) days training. If he fails the second time, his name will be removed from the firemen's seniority list.

3. (a) A fireman-trainee will be paid $763.89 per month. To receive the full rate he must be available

for a minimum of twenty-two days per month. The prorated daily rate of $34.72 may be deducted for each of the twenty-two days he is not available of his own volition.

(b) A fireman trainee may be used to fill a fireman's vacancy in emergency. For such service he will be paid the applicable rate. The amount so made on the day or trip to a maximum of $34.72 will be included in the monthly rate.

(c) Firemen-trainees will be covered by the national health and welfare plan (Group Policy Contract GA-23000), subject to the approval of the parties to the policy.

4. Firemen-trainees will be reimbursed for actual, reasonable and necessary travel, lodging and meal expenses incurred while engaged in orientation and classroom sessions or while otherwise headquartered at points beyond commuting distances from the home terminal of the fireman's seniority district. Such employee will use lodging facilities provided for operating employees at points where made available.

5. (a) Firemen will establish seniority as engineers in accordance with joint rules.

(b) A fireman-trainee in this program will not be examined for promotion until after he has had a minimum of one years service as a trainee and fireman, including service (if any) in another operating craft. The service herein is not necessarily limited to these lines. A fireman-trainee employed from another operating craft of these lines will retain years of service for vacation, health and welfare and other benefits.

(c) A fireman who completes this program and qualifies as an engineer will not be deprived of

employment by the A&WP-WofA by force reduction while there is a blanked fireman's assignment. Such firemen will be treated the same as protected C-6 or C-7 employees under requirements of Award No. 282.

6. Testing will be done at time periods designated by the Carrier. Employees will be furnished textbooks and other materials without cost.

7. (a) The Carrier will establish and execute the training program and will establish requirements for completion.

(b) The General Chairman will be furnished with an outline of the training program and a statement of the established requirements for completion.

(c) The General Chairman will be furnished with the name of each candidate and the date he is placed in training.

8. This agreement is made without prejudice to the position of either party with respect to any pending or future litigation and/or negotiation and will not be cited or referred to by either party or their representatives in negotiations on this railroad or any railroad or in national handling without written consent of the other party, except as may be necessary to assure compliance with the terms of this agreement.

9. The provisions of this agreement will modify and/or supplant existing UTU-E agreements in conflict therewith only to the extent necessary to give effect to the purpose and intent of this agreement.

10. (a) This agreement is not to be used to determine the number of members to be assigned to any crew. It is an interim settlement of the notice served upon the Carrier by the Union on November 15, 1965,

dealing with a training program subject to the conditions contained in this Section 10.

(b) This agreement will be superseded by the agreement or agreements if and when reached on a national basis dealing with training for promotion to engineer.

(c) Nothing contained herein is intended to modify in any way any provision of any of the joint rules.

(d) This agreement shall become effective May 7, 1971, subject to part (b) of this section, and shall remain in full force and effect until cancelled by either party serving thirty (30) days advance written notice, upon the other party; provided, however, that employees already under training in the program may continue, unaffected thereby, to completion or termination of their training, and, provided further, that this agreement shall be null, void and of no further force and effect if determined, judicially or otherwise, to be contrary to law or public policy.

Signed in Atlanta, Georgia, this 7th day of May, 1971.

For The United Transportation Union (E):

/s/ L. Stifflemire
L. Stifflemire
General Chairman

Approved:

/s/ R. L. McCollum
R. L. McCollum
Vice President—UTU

For The Atlanta and West Point Rail Road Company—
The Western Railway of Alabama:

/s/ T. P. King
T. P. King
Director of Personnel

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 1707

UNITED TRANSPORTATION UNION, an Unincorporated Labor Union, and C. M. CAGLE,
Petitioners,

v.

ATLANTA AND WEST POINT RAIL ROAD COMPANY and WESTERN RAILWAY OF ALABAMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF

HUGH W. GIBERT
2709 First National Bank Tower
Atlanta, Georgia 30303
Attorney for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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SUPPLEMENTAL BRIEF

INTRODUCTION

Petitioners respectfully urge the Court to consider this Supplemental Brief in reply to the response to the Petition for Certiorari. This reply is made necessary by the major reliance by the respondents upon their contention that the case has become moot by reason of the agreement signed on May 7, 1971. On the day that agreement was signed counsel was away from the city and the Petition for Certiorari was at the printer's. We have had no op-

portunity to address ourselves to the question of the effect of the May 7th agreement.

In addition, respondents argue that the case is moot by virtue of certain other circumstances. These latter contentions were presented to the Court of Appeals by means of a motion to dismiss the appeal but were ignored by that Court in its opinion. It did not seem appropriate to anticipate them in the petition. Since they have now been raised in this Court a brief comment is in order.

The May 7th Agreement Did Not Make the Case Moot

The agreement is not a final settlement of the underlying labor dispute. It provides, in part, as follows:

Section 8:

> "This agreement is made without prejudice to the position of either party with respect to any pending or future litigation and/or negotiation and will not be cited or referred to by either party or their representatives in negotiations on this railroad or any railroad or in national handling without written consent of the other party, except as may be necessary to assure compliance with the terms of this agreement."

Section 10(a):

> "This agreement is not to be used to determine the number of members to be assigned to any crew. It is an interim settlement of the notice served upon the Carrier by the Union on November 15, 1965, dealing with a training program subject to the conditions contained in this Section 10."

Insofar as it is possible for the parties to preserve their dispute for judicial determination, therefore, petitioners and respondents herein have preserved theirs. It may be that the case or controversy requirement of the Constitu-

tion precludes the parties from having complete control over this issue, but at least it is clear that they sought to preserve it.

The agreement is characterized by the parties as an "interim settlement." The reason is not far to seek. The union negotiated with both hands behind its back since it was restrained by what it regarded and regards as a plainly unlawful injunction. Since it was so restrained it took a good deal less than its otherwise would have and was unwilling that the agreement should be more than an "interim" settlement. The words of Mr. Justice Brennan, dissenting in **Chicago & Northwestern R. Co. v. United Transportation Union**, ... U.S. ..., 39 L.W. 4641 (June 1, 1971), are apt:

> "More important, however, is the mortal wound today's holding inflicts on the critical role to be played by the presence of economic weapons in reserve. **NLRB v. Insurance Agents**, *supra*, at 488-489. As the statutory machinery nears termination without achieving settlement, the threat of economic self-help and the pressures of informed public opinion create new impetus toward compromise and agreement. If self-help can now effectively be thwarted by injunction and by drawn-out court proceedings, after the termination of the entire bargaining process, or worse yet, at each step thereof, the threat of its use becomes impotent, indeed."

(This is only one of numerous instances when members of this Court have recognized the important role that the right to strike can play, not only in producing a **just** agreement but in facilitating the process of reaching any agreement at all.)

Because the parties have regarded their settlement as an interim one, and because the union is dissatisfied with the interim resolution imposed upon it with the aid of the

injunctive power of the District Court, there will necessarily be further discussions on the Section 6 notice that started this whole dispute, unless the carrier is as successful in the future at avoiding negotiations as it has been in the past. This will be true whether this Court regards the present dispute as "moot" or not. The carrier has candidly admitted, on numerous occasions, including its brief to the Court of Appeals and its brief in this Court (p. 14), that any effort by the Union to strike will be met by an injunction. (The carrier repeatedly asserts—see p. 23 of its brief in response to the petition for certiorari—that the union is barred from striking not only by the injunction but "by the Railway Labor Act itself." That very contention, that the Railway Labor Act is somehow self-executing, as though the members of the union would be struck by lightning if they struck in violation of it, shows that this dispute is not moot. Because it begs the very issue presented in the petition, namely, the relationship of the Railway Labor Act to the Norris-LaGuardia Act. Our contention is that the union can strike and can only be enjoined if (1) the strike violates the Railway Labor Act and (2) the carrier satisfies the District Court that its (the carrier's) hands are clean within the meaning of Section 8 of Norris-LaGuardia. The respondents' reply, which seems incomplete or unresponsive, is that "the Railway Labor Act itself" forbids a strike and therefore (sic) our contention need not be ruled upon.)

The District Court, by issuing an injunction while assuming that the carrier was **solely** at fault for the failure of the parties to have had negotiations, has shown its willingness to disregard Section 8 of the Norris-LaGuardia Act. The unlawful injunction, therefore, continues to play a substantial role in the dispute between the parties. In that circumstance, **Carroll v. Commissioners of Princess Anne**, 393 U.S. 175, 21 L.ed 2d 325, 89 S.Ct. 347 (1968),

is directly in point. In that case this Court reviewed, in 1968, the propriety of a ten-day restraining order which was issued and had expired in 1966. Against an argument of mootness the Court noted

> "that the decision of the Maryland Court of Appeals [sustaining the validity of the restraining order] continues to play a substantial role in the response of the officials to [petitioners'] activities." 393 U.S. at 178.

The **Carroll** case relied, on the mootness issue, upon **Bus Employees v. Missouri**, 374 U.S. 74, 10 L.ed 2d 763, 83 S.Ct. 1657 (1963), which concerned a labor dispute; it did not announce a doctrine peculiarly applicable to First Amendment cases.

Reliance by respondents upon **Oil, Chemical & Atomic Workers International Union v. Missouri**, 361 U.S. 363, 4 L.ed 2d 373, 80 S.Ct. 391 (1960), and **McLeod v. General Electric Co.**, 385 U.S. 533, 17 L.ed 2d 588, 87 S.Ct. 637 (1969), is misplaced. In **Oil, Chemical** the underlying labor dispute had been finally settled. Here it has not; the action of the parties in limiting their settlement to recognize the existence of a continuing dispute is critical. The **Bus Employees** case, *supra*, distinguished **Oil, Chemical** on precisely this ground. The **McLeod** case may also be distinguished on the same ground. The important difference is that in deciding that the **Oil, Chemical** case was moot this Court was careful to avoid speculation about future issues that might never arise. In the **Carroll** case, on the other hand, and in **Southern P. Terminal Co. v. I.C.C.**, 219 U.S. 498, 55 L.ed 310, 31 S.Ct. 379 (1911), and in **Bus Employees**, *supra*, the Court recognized that the mere fact of expiration of an injunction could not make a dispute moot, and acknowledged, as well, that if there were a distinct threat of recurring use of the injunction in similar future circumstances, that threat provided a basis for

jurisdiction. So long as there continues to be a live controversy, the case is not moot. That is the case here.

To the same effect, see also **Local 1976, U.B.C. & J. v. N.L.R.B.**, 357 U.S. 93, 2 L.ed 2d 1186, 78 S.Ct. 1011 (1958), n. 2 (threat of recurring violation prevents mootness), and **United States v. W. T. Grant Co.**, 345 U.S. 629, 97 L.ed 1303, 73 S.Ct. 894 (1953), (party claiming mootness must carry the heavy burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated").

Even if the agreement were a final settlement of the labor dispute the case would not be moot. So long as one issue remains unresolved, the constitutional requirement of a case or controversy is supplied and the case is not moot. **Powell v. McCormack**, 395 U.S. 486, 23 L.ed 2d 491, 89 S.Ct. 1944 (1969). Should this Court determine that the lower Court erred in issuing the preliminary injunction, petitioners will be able to proceed summarily by motion against Respondent and its surety for payment of its costs and damages arising from the injunction. Rule 65.1, Federal Rules of Civil Procedure. Therefore, regardless of any final settlement of the underlying labor dispute if the injunction was unlawful, respondents' liability to petitioners on its bond is sufficient to prevent the case from being moot. **Liner v. Jafco**, 375 U.S. 301, 11 L.ed 2d 347, 84 S.Ct. 391 (1964); see also **Textile Workers Union of America v. Lincoln Mills of Alabama**, 353 U.S. 448, 1 L.ed 2d 972, 77 S.Ct. 912 (1957).

The Case Is Not Moot for Any of the Other Reasons Cited

Respondents argue, as they did in the Court below, that the case is moot because the injunction has "expired," and because the union "could not lawfully strike" (p. 14) at this time, and because the carrier, having argued that

the injunction has expired would be estopped to try to enforce it at this time.

We will comment briefly on each of these arguments. However, they were presented to and rejected by the Court of Appeals and they seem to be subordinate to, if not swallowed up by, the argument that the signing of the May 7, 1971 agreement makes the case moot. If that argument fails the subordinate arguments should also fail.

(a) The injunction has not expired by its terms. It provides that it will continue in force "until . . . further order of the Court" and there has been no such order. Respondents contend that the union could have such an order for the asking: all we have to do is say that the parties have complied with the Act and settled their dispute. However, we have already seen that the dispute is not settled and the union contends that the Carrier has not complied with the Act and that an interim unsatisfactory settlement has been forced upon the union with the aid of the injunction. In light of these contentions, obviously we cannot make the necessary representations to the District Court and get the injunction lifted.

(b) The case is not moot because the union "could not lawfully strike" anyway. The circularity of that argument is obvious. It presupposes an automatic issuance of an injunction in a labor dispute. We have argued in the petition for certiorari that the Norris-LaGuardia Act has something to do with this case. That argument cannot be rendered moot by the assumption that a District Court in a new case will issue a new injunction in spite of the Norris-LaGuardia Act. In fact, to the extent that it is probable that the District Court **would** again ignore the Norris-LaGuardia Act there exists the danger of recurring improper injunctions which, under **Carroll** and the other cases we have cited above, prevents the case from being moot.

(c) The case is not moot because the carrier, having argued that the injunction has expired, would be estopped from enforcing it. Although it does argue that the injunction has expired, the carrier declares in the same breath that a new injunction can be had for the asking because "the Railway Labor Act itself" prohibits a strike. Thus, the union can derive but cold comfort from that argument. The carrier, therefore, has not carried the heavy burden of showing that there is no danger of another unlawful injunction. On the contrary, it argues that the previous injunction was lawful and that is the issue on the merits.

Petitioners asserted the right to strike on three separate grounds: (1) the refusal of the carrier to bargain; (2) the execution of an agreement by the carrier with the Brotherhood of Locomotive Engineers, which agreement effected a change in the working conditions of petitioner's members, without complying with the Railway Labor Act; and (3) that the actions of the carrier had the purpose (and might have the effect) of destroying the U.T.U. and forcing its members into the B.L.E.

The mootness arguments pressed by the Respondents do not address themselves to the second and third issues at all. No claim is made that the benefits of the unlawful deal with the B.L.E. have been disgorged since the preliminary injunction hearing. No claim is made that the agreement is not still in effect. Of course the appellee disagrees with our contention that it deal with the B.L.E. changed the working conditions of the members of the U.T.U. However, that is a matter for this Court to consider on the whole record; it is certainly not moot.

Likewise, the third ground urged in the petition claims that Section 8 of the Norris-LaGuardia Act precludes an injunction because the whole record shows a pattern of favoritism toward the B.L.E. as against the U.T.U. The

ultimate object of the Carrier is to destroy the firemen's union (and the craft of fireman) and thus influence its employees to choose the B.L.E. as bargaining representative. Naturally this contention is disputed. But nothing has happened to make it moot.

CONCLUSION

Petitioners urge the Court to grant the writ and consider the case on the merits. It is a matter of very great importance both to the parties and to the railroad industry.

Respectfully submitted

HUGH W. GIBERT
Attorney for Petitioners

HAAS, HOLLAND, LEVISON & GIBERT
2709 First National Bank Tower
Atlanta, Georgia 30303
(404) 525-6141